UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF AGRICULTURE

Resource Agency Hearings and	**)**	
Alternatives Development Procedures	**)**	**RIN 0596-AC42**
In Hydropower Licenses	**)**	

COMMENTS OF THE NATIONAL HYDROPOWER ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE, AND PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON ON REVISED INTERIM FINAL RULES

Pursuant to the notice issued on March 31, 2015 by the Departments of Agriculture, the Interior, and Commerce (Departments),[1] the National Hydropower Association (NHA), American Public Power Association (APPA), Edison Electric Institute (EEI), and Public Utility District No. 1 of Snohomish County, Washington (SnoPUD) (collectively, Industry Commenters) hereby submit these comments on the Departments' Revised Interim Rules for Resource Agency Hearings and Alternatives Development Procedures in Hydropower Licenses (Revised Rules)[2] establishing procedures to implement the hydroelectric licensing provisions of Section 241 of the Energy Policy Act of 2005 (EPAct 2005).[3]

I. BACKGROUND

Industry Commenters have a direct interest in the Departments' Revised Rules.

NHA is a national non-profit association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. Its membership consists of more than 200 organizations including

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1 Resource Agency Hearings and Alternatives Development Procedures in Hydropower Licenses, 80 Fed. Reg. 17,156 (Mar. 31, 2015) [hereinafter, Revised Rules].

2 Although these comments specifically reference the Department of Agriculture's revised interim final rules, they apply equally to all three Departments' revised interim final rules. Accordingly, pursuant to the Revised Rules, Industry Commenters understand that these comments will be shared with the Departments of Interior and Commerce for the Departments' collective consideration of all comments received on the revised interim final rules. *See id.* at 17,156.

3 Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

public utilities, investor-owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants, and attorneys. NHA filed comments on the Departments' interim final rules (Interim Rules) issued in 2005,[4] and its members have a direct interest in the Revised Rules.

APPA is the national service organization representing the interest of not-for-profit, publicly-owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and serve over 48 million people, doing business in every state except Hawaii. Hydroelectric projects comprise 17 percent of public power's total generating capacity and 133 public systems have hydroelectric capacity. Many of APPA's members operate hydroelectric projects that are currently undergoing licensing at the Federal Energy Regulatory Commission (FERC), or will be undergoing licensing in the next few years. A number of its members also are developing new hydroelectric projects. APPA filed comments on the Departments' 2005 Interim Rules and its members will be directly affected by the Departments' decisions on the Revised Rules.

EEI is the trade association of United States shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. Its U.S. members represent approximately 70 percent of the U.S. electric power industry and generate 60 percent of the electricity produced by U.S. generators. In providing these services, many EEI members rely on hydropower, and many own and operate hydropower projects licensed by FERC. In fact, EEI members comprise the largest group of FERC hydropower project license holders. EEI also commented on the Departments' 2005 Interim Rules.

[4] Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804 (Nov. 17, 2005) [hereinafter, Interim Rules].

SnoPUD, a municipal corporation of the State of Washington, is the largest public utility district in the State of Washington and the second largest publicly owned utility in the Pacific Northwest. SnoPUD is co-licensee of the Henry M. Jackson Hydroelectric Project (Jackson Project), a 112 megawatt generating facility that received a new 45-year license from FERC in September 2011. SnoPud also has a number of new small hydroelectric facilities in various stages of development. SnoPUD filed comments on the Departments' Interim Rules issued in 2005.

Section 241 of EPAct 2005, signed into law on August 8, 2005, provided three significant improvements to the mandatory conditioning aspects of hydropower licensing. First, in a new Section 33 of the Federal Power Act (FPA), it required the Departments to give "equal consideration" to the effects of a condition or prescription under Section 4(e) or 18 of the FPA on "energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality" in addition to other aspects of environmental quality. Second, it amended Sections 4(e) and 18 to provide a licensee or any party to a licensing proceeding an opportunity to challenge, through a trial-type hearing, the factual basis of agency conditions and prescriptions. Third, it added in new FPA Section 33 a requirement that the Departments accept alternative conditions and prescriptions put forth by an applicant or other party if the alternatives meet certain criteria. EPAct 2005 required the Departments to jointly promulgate rules to implement the statute within 90 days.[5]

On November 17, 2005, the Departments issued Interim Rules for implementing the trial-type hearing and alternatives provisions of Section 241 of EPAct 2005.[6] A number of parties

[5] EPAct 2005 § 241(a), 119 Stat. at 675.

[6] Interim Rules, 70 Fed. Reg. 69,804 (Nov. 17, 2005).

filed comments on the Interim Rules, including each of the Industry Commenters.[7] Since enactment of the Interim Rules, over 20 parties have filed requests for a trial-type hearing, and three hearings have been held by Department-designated administrative law judges (ALJ). In August 2010, the U.S. Government Accountability Office (GAO) issued a report analyzing implementation of Section 241 of EPAct 2005.[8] The GAO report called for the Departments to issue revised rules after providing an additional period for notice and an opportunity for public comments.[9] On March 31, 2015, the Departments issued their Revised Rules, which became effective on April 30, 2015, providing a public comment period on the Revised Rules ending June 1, 2015.[10] The Revised Rules indicate that the Departments "will consider promulgation of further revised final rules,"[11] based on the comments received.

Industry Commenters offer the following comments on the Revised Rules, and support issuance of further revised final rules to incorporate these changes. These comments are based on the group members' previous comments and the hydroelectric industry's collective experience with the trial-type procedures in practice, both in cases that proceeded through trial and others that commenced and settled prior to trial. The industry's experience with the Interim Rules has borne out many of the concerns raised in the 2006 comments on the Interim Rules. The Revised Rules provide some positive changes. However, further improvements are needed. Other changes and "clarifications" provided in the Revised Rules are cause for renewed or

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[7] Comments of the Edison Electric Institute and the National Hydropower Association, RIN 0596-AC42 et al. (Jan. 17, 2006) [hereinafter, NHA and EEI Comments]; Comments of the American Public Power Association, Sacramento Municipal Utility District, and Public Utility District No. 1 of Snohomish County on Interim Final Rules, RIN 1094-AA51 (Jan. 17, 2006) [hereinafter, Public Commenters' Comments].

[8] United States Government Accountability Office, *Hydropower Relicensing: Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed*, GAO-10-770 (Aug. 2010), *available at* http://www.gao.gov/new.items/d10770.pdf [hereinafter, GAO Report].

[9] *Id*. at 19.

[10] *Id*.

[11] Revised Rules at 17,157.

additional concern. Industry Commenters strongly recommend that the Departments issue further revised final rules to address these areas of concern and to finalize the procedures for future hearings.

II. COMMENTS

A. Equal Consideration

As noted above, new Section 33 of the FPA requires that the Secretary concerned submit into the public record a written statement that demonstrates that the Secretary gave "equal consideration" to a number of factors when adopting any condition or prescription, including energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality.[12]

The Interim Rules, however, were ambiguous as to whether the Secretary must give equal consideration to these factors when no Section 33 alternatives have been presented. Instead, they expressly required the Departments to submit their equal consideration analysis only of a "modified condition or prescription and any proposed alternatives . . . [*i*]*f* any license party proposes an alternative to a preliminary condition or prescription."[13] Many commenters raised this omission in their comments on the Interim Rules;[14] and their concern was well founded. Since enactment of EPAct 2005, in practice the Departments have consistently declined to give "equal consideration" when submitting "any" mandatory condition or prescription, as required by the statute. Instead, the Departments have narrowly applied this requirement only when a party formally submits an alternative under Section 33. For example, in late 2005, a licensee filed a motion to reject a modified fishway prescription, on the basis that the Secretary of

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[12] EPAct 2005 § 241(c), 119 Stat. at 675-76.

[13] Interim Rules at 69,839.

[14] NHA and EEI Comments at 15-16; Public Commenters' Comments at 3-4.

Commerce had not included an equal consideration statement.[15] In response, the Secretary indicated that the Department is under no obligation to apply the "equal consideration" standard to mandatory conditions unless an alternative is submitted under FPA Section 33.[16]

The Revised Rules expressly now adopt this narrow interpretation and assert in the preamble to the rules that FPA Section 33 requires a Department to prepare an equal consideration statement only when a party has submitted an alternative condition or prescription.[17] To justify their interpretation, the Departments point to the title of Section 33 ("Alternative conditions and prescriptions") which lays out the steps for considering proposed alternatives. The Departments further state that the equal consideration requirement "does not apply at the preliminary condition or prescription stage, since no alternatives have been submitted at that stage. And it does not apply at the modified condition or prescription stage, unless a license party has proposed an alternative."[18] The Revised Rules also assert that in the absence of a proposed alternative, the Departments will generally lack sufficient information about the factors (energy supply, distribution, cost, and use; flood control; navigation; water supply; air quality; and other aspects of environmental quality) to provide a meaningful equal consideration statement.[19]

The Departments' interpretation of FPA Section 33 to give equal consideration only in a case where an alternative is presented is contrary to the plain language of the statute. The statutory language in Section 33(a)(4) is clear on its face and unambiguous. It provides that

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[15] Augusta, GA's Motion for Rejection of Modified Fishway Prescription at 8, FERC Project No. 11810-004 (filed Aug. 30, 2005).

[16] National Marine Fisheries Services' Response to the Motion for Rejection of Modified Prescription for Fishways at 3, FERC Project No. 11810-008 (filed Oct. 14, 2005).

[17] *See* Revised Rules at 17,156-57 and 17,176-77.

[18] *Id*. at 17,177.

[19] *Id*.

> [t]he Secretary concerned shall submit into the public record of the Commission proceeding with *any* condition under section 797(e) of this title or alternative condition it accepts under this section, a written statement explaining the basis for such condition, and reason for not accepting any alternative condition under this section.[20]

The language in Section 33(b)(4) mirrors this language with respect to fishway prescriptions under FPA Section 18.[21] In each section, the statute twice references a condition or prescription under Sections 4(e) or 18 or an alternative condition. Thus, while this statutory provision falls under the heading of "Alternative conditions" and "Alternative prescriptions," the language clearly states that the equal consideration requirement is triggered by the Secretary's submission of any condition or prescription or a party's submission of an alternative.

Because Congress plainly intended that all FPA Section 4(e) conditions and Section 18 prescriptions be subject to the "equal consideration" standard, the Departments had no reason to conduct a contextual analysis of Section 33 to interpret the statutory language. And, while the title of a statute or section can serve in some cases as an interpretive aid, it is "not meant to take the place of the detailed provisions of the [statutory] text"[22] and "cannot limit the plain meaning of the [statutory] text."[23]

The Departments' concern that, in the absence of an alternative, they will "generally lack sufficient information about the factors . . . to provide a meaningful equal consideration statement"[24] are unfounded. Section 33 of the FPA requires the Secretary to include an equal consideration statement "based on such information as may be available to the Secretary,

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[20] 16 U.S.C. § 823d(a)(4) (emphasis added).

[21] *Id*. § 823d(b)(4).

[22] *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co*., 331 U.S. 519, 528 (1947).

[23] *Id*. at 529; *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 256 (2004) (quoting *Trainmen*).

[24] Revised Rules at 17,177.

including information voluntarily provided in a timely manner by the applicant and others."[25] Ample information on power and non-power factors affecting a project are available at this stage in a FERC licensing proceeding, as the license applicant has completed its studies, issued study reports, and submitted a voluminous licensing application into the FERC record. License applicants are required by FERC's regulations to include information on all aspects of a project's energy supply, distribution, cost, and use, flood control, navigation, water supply, air quality, and all aspects of environmental quality in their license application.[26] License applicants are required to serve a copy of their licensing application on each resource agency with mandatory conditioning authority, so the Department will have a copy of the application at the time it must draft its equal consideration statement.[27] Moreover, all of the licensing documents are publicly available and easily accessible on FERC's website.[28] Without this information, the Departments presumably would not have sufficient information to draft meaningful preliminary conditions and prescriptions. With volumes of information in hand, the Departments have all the necessary information for an equal consideration statement to be included with their modified conditions and prescriptions, as required by FPA Section 33.

Industry Commenters request that the Departments revisit their interpretation of EPAct 2005 and acknowledge in further revised rules that they are required to give equal consideration to the listed factors any time they adopt a condition or prescription, regardless of whether any alternatives were presented under Section 33.

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[25] 16 U.S.C. § 823d(a)(4).

[26] *See* 18 C.F.R. §§ 4.51, 5.18 (2014).

[27] *Id*. § 5.17(d)(1).

[28] *See* Federal Energy Regulatory Commission, http://www.ferc.gov/ (last visited May 27, 2015).

B. Burden of Proof

Industry Commenters strongly disagree with the Departments' decision to assign the burden of proof to the party requesting a hearing.[29] By granting a right to a trial-type hearing in the FPA, Congress has indicated that the Departments should be held to a higher evidentiary standard in justifying the conditions and prescriptions they impose on a licensee. Further, the procedural rules contained in the Administrative Procedure Act (APA)[30] apply to agency adjudication if a statute outside the APA calls for formal adjudication, such as a "hearing on the record," or an "evidentiary hearing." Accordingly, the APA's rule assigning burden of proof applies to a trial-type hearing under FPA Sections 4(e) and 18. Pursuant to Section 7(c) of the APA, the default rule for allocating the burden of proof requires that the burden be placed on the proponent of an order.[31]

In the licensing process, the Departments are the proponent of their mandatory conditions or prescriptions which they seek to attach to a licensing order as well as the alleged facts supporting those conditions or prescriptions. A party opposing a proposed condition or prescription, including the material facts underlying a condition or prescription, is an "opponent," not a "proponent." The APA standard for assigning the burden of proof places the burden squarely on the Departments to prove the factual predicate for those conditions or prescriptions. In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians,*[32] the

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[29] Revised Rules at 17,170-71.

[30] 5 U.S.C. §§ 500-596 (2012).

[31] *Id.* § 556(d). *See also Director, Office of Workers' Comp. Programs v. Greenwich Collieries,* 512 U.S. 267 (1994) (holding that the "burden of proof" set forth in the APA imposes the burden of persuasion on the proponent of a rule or order). This rule conforms to the common law tradition. *See* 2 Kenneth S. Brown et al., *McCormick on Evidence* § 337 (7th ed. 2013) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the [party] who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.").

[32] 466 U.S. 765 (1984).

Supreme Court made clear that the conditioning agency is responsible for assembling the evidence in support of its condition or prescription. This is consistent with the APA requirement that the proponent of an order "has the burden of proof." Thus, although the requester of a trial-type hearing is "the party seeking relief,"[33] the Departments retain the burden in trial-type hearings to show that a preponderance of the evidence supports any disputed material fact supporting their proposed conditions and prescriptions and cannot shift that burden to others.[34]

Industry Commenters have included proposed revisions to Section 1.657 to place the burden of proof on the Departments as the proponents of their mandatory conditions and prescriptions.

C. Hearings on Modified Conditions and Prescriptions

EPAct 2005 entitles any party to the proceeding to a trial-type hearing "on any disputed issues of material fact with respect to [a Department's] conditions."[35] The Interim Rules implementing this provision of EPAct 2005 required that a request for a trial-type hearing be filed "within 30 days after the deadline for the Departments to file *preliminary* conditions and prescriptions with FERC."[36] However, the Interim Rules were silent as to whether the right to a trial-type hearing existed on any disputed issues of material fact with respect to a Department's modified conditions or prescriptions where: 1) the Department issues no preliminary conditions or prescriptions, but reserves the right to submit mandatory conditions or prescriptions later in the licensing process; 2) the Department adds conditions or prescriptions that were not included

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[33] *See* Revised Rules at 17,170-71.

[34] Regardless of burden of proof, the rules are correct that the standard of proof in a trial-type hearing is preponderance of the evidence. In at least one trial-type hearing, the Departments advocated that the ALJ give deference to their conditions under a substantial evidence standard, a much lower threshold for supporting agency conditions than preponderance of the evidence. The Departments must adhere to their own rules with regard to the standard of proof.

[35] EPAct 2005 § 241(a), 119 Stat. at 674.

[36] Interim Rules at 69,832 (emphasis added).

with its preliminary conditions or prescriptions; or 3) the Department's modified conditions or prescriptions include factual issues or justifications that were not presented with its preliminary conditions or prescriptions. Commenters raised these issues in their comments on the Interim Rules, predicting that a Department could avoid a trial-type hearing under these three scenarios.[37]

The Revised Rules do not address the first scenario. They address the second scenario by acknowledging that "exceptional circumstances may arise where facts not in existence and not anticipated at an earlier stage necessitate a new preliminary condition or prescription" but propose to handle the issue "on a case-by-case basis."[38] The Revised Rules do not address the third scenario.

In practice, limiting the trial-type hearing right to preliminary conditions and prescription has resulted in license applicants losing their statutory right to a trial-type hearing. For instance, following the U.S. Forest Service's (USFS) submission of preliminary 4(e) conditions for FERC Project No. 2107, the licensee submitted alternative conditions and a request for a trial-type hearing in December 2005. USFS and the licensee entered into settlement discussions and resolved their differences. In late 2006 the USFS filed modified 4(e) conditions to reflect the parties' agreement on amended 4(e) conditions and the licensee withdrew its hearing request and proposed alternatives. The preliminary 4(e) conditions included a condition on ramping rates to which the licensee did not object and therefore did not challenge in its hearing request or address in its alternative conditions. However, USFS in May 2007 submitted revised modified 4(e) conditions that included revisions to that condition on ramping rates to which the licensee objected. The licensee in June 2007 submitted to USFS an alternative condition and request for

[37] EEI and NHA Comments at 16-18; Public Commenters' Comments at 4-6.

[38] Revised Rules at 17,164.

trial-type hearing as to the revised ramping rate condition. In a letter to the licensee dated July 3, 2007, USFS stated that its regulations do not allow for the consideration of alternative conditions and requests for trial-type hearings submitted more than 30 days after the deadline for USFS to submit its preliminary conditions. Thus, the licensee's only remedy was to seek judicial review of FERC's license order.

The Departments argue that holding a hearing at the preliminary stage ensures that the process will not disrupt FERC's licensing schedule, and promotes efficiency by allowing the Departments to assess all relevant information, including an ALJ opinion, and modify the conditions and prescriptions in one coordinated effort.[39] They also argue that holding a hearing at the modified stage "could require the Departments to revise and resubmit conditions and prescriptions, thereby adding an additional step and additional time to the process" which could delay license issuance.[40]

The Departments' arguments that a challenge to modified conditions or prescriptions would delay license issuance are overstated. The hydro licensing process is a years-long process, and a 90-day hearing will not make a noticeable difference in the timeline, particularly in light of the better-informed decision making that will result. In any event, if the Departments included all of their conditions and prescriptions at the preliminary stage, giving licensees and other parties their opportunity to challenge disputed issues of material fact up front, there would never be a need to challenge modified conditions or prescriptions and further delay the process.

The final rules must provide a remedy for licensees who object to new conditions and prescriptions imposed at the modified stage, or when the Department's modified conditions or prescriptions include factual issues or justifications that were not presented with its preliminary

[39] *Id.* at 17,163.

[40] *Id*.

conditions or prescriptions. The current rules leave a loophole for the Departments to avoid a trial-type hearing altogether by postponing issuance of controversial conditions and prescriptions until release of the modified conditions and prescriptions. The final rules must provide a standard for when a modified condition or prescription would trigger the right to a trial-type hearing. A plain reading of the statute, which entitles a party to "a trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to" mandatory conditions and prescriptions,[41] compels this interpretation.

Industry Commenters have attached proposed revisions to the Department's regulations to implement the changes discussed above. *See* § 1.601(c).

D. Applicability of Rules on Reopener

Industry Commenters commend the Revised Rules for clarifying that a trial-type hearing and submission of alternatives are available where a Department has previously reserved its authority to include conditions or prescriptions in a FERC license at a later time, and invokes that authority during the license term.[42] Specifically, the Revised Rules provide that

> [w]here the [USFS] has notified or notifies FERC that it is reserving its authority to develop one or more conditions or prescriptions at a later time, the hearing and alternatives processes under this subpart for such conditions or prescriptions will be available if and when the [USFS] exercises its reserved authority.[43]

While not clear from the face of the proposed regulations, the Departments in the preamble suggest that this right applies only when the Department does not submit conditions or prescriptions for inclusion in the license during the licensing proceeding, but reserves its

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41 EPAct 2005 § 241(a), 119 Stat. at 674.

42 Revised Rules at 17,156, 17,159. Industry Commenters also commend the Departments for revising the rules to clarify the availability of a trial-type hearing and submission of alternatives when a Department exercises authority reserved in a license issued prior to November 17, 2005. *See id.* at 17,159; 7 C.F.R. § 1.601(d)(2).

43 *See* Revised Rules at 17,182 (7 C.F.R. § 1.601(c) (as proposed)).

authority to do so at a later time.[44] The Revised Rules do not appear to provide for a trial-type hearing or the submission of alternatives when an agency imposes conditions and prescriptions during the licensing proceeding, reserves its right to impose additional or modify existing conditions or prescriptions during the license term, then exercises that reserved right.

The rules should provide an opportunity for trial-type hearing and submission of alternatives when a Department that has imposed conditions or prescriptions on a license exercises reserved authority to include additional or modify existing conditions or prescriptions that have already been incorporated into a FERC license. It is standard practice for the Departments to include a reservation of authority to modify the conditions or prescriptions they impose on a license or to add additional conditions or prescriptions during the license term. The standard language of a Section 4(e) reservation, for example, provides that "[t]he licensee shall implement, upon order of the Commission, such additional measures as may be identified by the Secretary pursuant to the authority provided in [Section] 4(e) of the [FPA], as necessary for the adequate protection and utilization of the [reservation of the United States occupied by the project].[45] The standard language of a Section 18 reservation likewise provides that "[t]he Secretary reserves the authority, after notice and opportunity for hearing, to modify this prescription and/or to prescribe additional fishways during the term of any license issued, based on new material and relevant information."[46]

If and when a Department exercises this right during the license term, licensees should be entitled to a trial-type hearing and alternatives process. Section 241 of EPAct provides that license applicants and other parties to a hydropower licensing proceeding "shall be entitled to a

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[44] *Id*. at 17,159.

[45] *Avista Corp*., 127 FERC ¶ 61,265 (2009).

[46] *Sabine River Auth. of Tex. & Sabine River Auth., State of La.*, 148 FERC ¶ 62,171 at p. 64,602 (2014).

determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to" mandatory conditions and prescriptions.[47] Departments that impose new or substantially modified mandatory conditions or prescriptions under reserved authority during the license term have an obligation under the license to justify these changes based on a change in facts. Moreover, a licensee's obligations and financial burden under an existing license can substantially change if a Department exercises reserved authority to impose new conditions or prescriptions or make a material change to an existing condition or prescription. Thus, a licensee or other party is entitled to an opportunity to challenge disputed issues of material fact with respect to any proposed new or modified mandatory condition or prescription imposed by a Department during the license term.

Industry Commenters have included a proposed revision to Section 1.601(c) to clarify the applicability of the rules in post-license reopener proceedings where a Department that has imposed conditions or prescriptions exercises reserved authority to require new or modified conditions or prescriptions during the license term.

E. Submission and Acceptance of Alternatives

EPAct 2005 expressly provides that a Department must accept a proposed alternative if the Department determines that the alternative: "(A) provides for the adequate protection and utilization of the reservation; and (B) will either, as compared to the condition initially proposed by the Secretary—(i) cost significantly less to implement; or (ii) result in improved operation of the project works for electricity production."[48] The Revised Rules also require the Departments

[47] EPAct 2005 § 241(a), 119 Stat. at 674 (codified at 16 U.S.C. §§ 797(e), 811).

[48] EPAct 2005 § 241(c), 119 Stat. at 675 (codified at 16 U.S.C. § 823d(a)(2). An identical provision for prescriptions appears in Section 823d(b)(2)).

to accept an alternative if it meets these criteria.[49] However, despite these authorities, the Departments have a 10 year record demonstrating that they do not accept proposed alternatives in lieu of their preliminary conditions and prescriptions. An August 2010 GAO report analyzing implementation of EPAct 2005 noted that of the 211 alternative conditions and prescriptions filed as of the report's publication date, the Departments have "accepted no alternatives as originally proposed . . . ."[50] The GAO report concluded that instead of adopting the Department's condition or prescription or another party's alternative, the Departments most often modified the preliminary conditions and prescriptions in settlement negotiations with stakeholders.[51] In addition, the report found that "with few exceptions, [the Departments] did not explain the reasons for not accepting alternatives when they modified conditions and prescriptions.[52] Industry Commenters are not aware of a Department accepting a party's Section 33 alternative in the years since the GAO report.

Certainly Industry Commenters do not object to the Departments modifying their conditions and prescriptions as a result of settlement. However, the GAO report's findings indicate that the Departments are failing to implement the statutory mandate to accept a proposed alternative that meets the requisite criteria or explain why it does not meet them. Of the hundreds of alternative conditions and prescriptions submitted to the Departments since 2005, it is difficult to believe that none of them met the statutory criteria. These results suggest the Departments are simply ignoring their statutory mandate.

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49 7 C.F.R. § 1.674(b).

50 GAO Report at 1.

51 *Id*. at 11-12.

52 *Id*. at 12.

Industry Commenters are not providing proposed revisions to the rule to address this issue, as the rules already provide that the written statement accompanying a Department's modified condition or prescription must explain the basis for the modified conditions or prescriptions and, if the Department did not accept an alternative condition or prescriptions, its reasons for not doing so.[53] The Departments must adhere to the plain language of EPAct 2005 and their own rules and accept proposed alternatives if they meet the statutory criteria, or explain the basis for changes to their proposed conditions and prescriptions.

Industry Commenters commend the Departments for changing the rules to provide a party who has participated in a trial-type hearing and has filed an alternative the opportunity to submit a revised alternative within 20 days after the ALJ decision, based on the facts as found by the ALJ.[54] This provision allows parties an opportunity to propose changes to address the ALJ's findings and gives them some input into the modified conditions to be incorporated into the license. However, the deadline for revised alternatives under the rules—within 20 days of issuance of the ALJ opinion—is unnecessarily short. ALJ opinions in the trials to date have been in excess of 100 pages and are highly technical in nature. Under the current deadline, licensees are expected to receive the ALJ's opinion, review and digest it, devise revised alternatives to address the findings of facts, and file them in under three weeks. The Departments provide no explanation for this short turnaround time. Under their own timeline, the Departments have given themselves up to 60 days from the deadline for parties to file revised alternatives to file modified conditions or prescriptions.[55] And this deadline may be extended if the Department

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53 7 C.F.R. § 1.674(d).

54 Revised Rules at 17,156, 17,174.

55 *See id.* at 17,193 (7 C.F.R. § 1.673(a) (as proposed)).

needs additional time.[56] There is no logical reason why parties should only be allotted 20 days to revise their proposed alternatives when the Departments have much longer timelines to revise their conditions and prescriptions. Industry Commenters suggest that this deadline be extended to 60 days after issuance of the ALJ opinion, and have proposed a revision to Section 1.672 to reflect this change.

F. Definition of Disputed Issue of Material Fact

A number of commenters on the Interim Rules suggested that the Departments provide additional guidance on the types of issues appropriate for resolution in a trial-type hearing. In the Revised Rules, the Departments do not revise the regulations, but clarify that a "'disputed issue of material fact' must meet three fundamental requirements: The matter raised must (1) concern a 'fact,' (2) be 'material,' and (3) be 'disputed.'"[57] The Departments specify that an ALJ should not resolve issues of law or policy. The Departments cite specific examples of matters of policy that they assert are not appropriate for a trial-type hearing, such as "what types and levels of adverse effects to a species from a project would be 'acceptable,' or what kinds of mitigation measures may be desirable or 'necessary' to protect a resource."[58] The Departments explain that these "are not matters of fact, but rather matters of policy judgment committed to the discretion of the Departments, in light of their management objectives for the resource."[59] In contrast, the Departments state that "historical facts" such as whether fish were historically present above a dam "may be resolved based on available evidence and do not involve attempts to predict what may happen in the future."[60]

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[56] *Id*. (7 C.F.R. § 1.673(b) (as proposed)).

[57] *Id.* at 17,177.

[58] *Id*.

[59] *Id*. at 17,178.

[60] *Id*.

The Departments' overbroad notion of what is a legal or policy issue as opposed to a factual issue threatens to eviscerate the EPAct 2005's right to a trial-type hearing. Not coincidentally, it also reflects positions the Departments have taken in ALJ hearings to attempt to exclude matters that are clearly factual in nature – attempts which ALJs have consistently rebuffed.

For example, the FERC Project No. 1971 proceeding consisted of two unconsolidated trial-type hearings, one before a Department of the Interior ALJ and one before a Department of Agriculture ALJ. In the Department of Agriculture proceeding, the USFS moved to dismiss all issues of material fact with respect to the disputed condition concerning sandbar maintenance and restoration, arguing that the issues were either immaterial or legal or policy questions. The ALJ denied the motions to dismiss, finding that the arguments of the government "would render the very purpose of the amended [FPA] as it applies to these proceedings virtually meaningless."[61] The ALJ held that:

> These proceedings were designed to allow the development of facts, to allow the FERC to make decisions with a solid factual basis, and based upon more than the opinions and recommendations and opinions of government officials. Couching every factual issue as potentially involving a legal or policy decision, as the Forest Service and intervenors consistently appear to do, serves to do little but avoid the very task that Congress sought to impose on the administrative judiciary by the 2005 amendments. Each of the factual issues alleged to be disputed by Idaho Power appears to involve, at least arguably, underlying competing factual issues which I believe it is within my jurisdiction to resolve.[62]

The ALJ dismissed the USFS's motions, finding that Congress's intent in passing EPAct 2005 was to allow licensees "to seek expedited administrative resolution . . . of disputed material facts

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[61] *In re Idaho Power Co., Hells Canyon Complex*, Ruling Denying Motions to Dismiss Issues at 2, EPAct Docket No. 06-0001 (issued May 24, 2006).

[62] *Id*.

regarding conditions imposed by" the USFS, and denial of the USFS's motions to dismiss "is the path most consistent with congressional intent."[63]

In the companion hearing before a Department of the Interior ALJ on U.S. Bureau of Land Management (BLM) conditions for FERC Project No. 1971, BLM filed motions to dismiss all of the licensee's disputed issues of material fact, arguing that all of the issues were either purely policy issues or, in the alternative, were issues of fact that were not material in content. The ALJ dismissed BLM's motions, holding that BLM must demonstrate material factual bases for the imposition of its mandatory conditions. The ALJ held that "BLM's motions to dismiss, taken in context, seem to suggest that the proposed 4(e) conditions filed with FERC were based either on whimsy or, in the alternative, solely on policy grounds with no factual underpinning."[64] With respect to BLM's attempt to dismiss disputed issues through pre-trial motions based on immateriality, the ALJ found that

> until the written witness testimony is proffered prior to the hearing . . . , and, until those witnesses are cross-examined during the hearing, as a matter of process and procedure, it may not be possible for [the ALJ] to make a responsible determination with respect to the materiality of particular facts on appeal.[65]

The ALJ concluded that "under both the statute and the implementing regulations, the determination of whether an appealed fact is material is an ongoing process, which may require a full hearing for resolution."[66]

In the trial-type hearing for FERC Project Nos. 2545 and 12606 before a Department of the Interior ALJ, the Bureau of Indian Affairs (BIA) moved to dismiss most of the licensee's proposed issues of disputed fact on grounds that they were questions of policy or that the fact

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[63] *Id*. at 3.

[64] *Idaho Power Co. v. Bureau of Land Management*, Order Denying BLM's Motions to Dismiss in Part and Reserving in Part at 2, Docket No. DCHD-2006-01 (issued May 1, 2006).

[65] *Id*. at 3.

[66] *Id*.

was immaterial. BIA argued that disputed issues that included words such as "substantial," "primary," "significant," and "negligible," in describing Project effects, implicated policy considerations and were not properly before the ALJ. In the Prehearing Conference Order, the ALJ reframed certain issues to render them more precise, but noted that "the use of such terms does not automatically render the issue non-factual."[67] The ALJ held that "[a]lthough there may be a policy component in ultimately determining the appropriate condition, an issue is still factual if it is substantively directed to a disputed factual assertion in BIA's supporting materials."[68]

On the issue of materiality, the ALJ noted that "BIA attempts to downplay the importance of many of its factual assertions in challenging their materiality."[69] The ALJ found that "[e]ven where BIA argues it will not rely on a particular fact, it could still be material under a more objective standard if I determine a reasonable administrator 'may' consider that fact in proposing final conditions."[70] The ALJ accepted the licensee's argument that an issue is material if it "'may' affect the Department's decision on a condition."[71]

The Departments' attempt to distinguish between an "historical fact" and matters of "prediction" is a false dichotomy. Whether a condition or prescription will, in practice, have the desired effect or achieve an agency's goals is a factual question, not a policy question. All conditions and prescriptions are attempts to achieve a future result, and thus have predictive elements. Parties often disagree with an agency whether its condition or prescription will

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[67] *Avista Corp. v. U.S. Bureau of Indian Affairs*, Prehearing Conference Order at 10, Docket No. DCHD-2007-01 (issued Nov. 1, 2006).

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id.* at 9.

achieve that result. An essential and fundamental element of the scientific method is prediction.[72] In this context, the Departments confuse scientific method with policy matters. Scientific prediction is a tool for crafting environmental policies. Any disputed issues of material fact with regard to the science behind proposed conditions or prescriptions are appropriate for determination by the ALJ. The Departments can then use the ALJ's findings of fact in executing their policy decisions by issuing modified conditions and prescriptions.

Moreover, if the Department includes a factual justification for a condition or prescription, it cannot then argue that the fact is immaterial and inappropriate for resolution before an ALJ. A Department is required under the rules to provide a rationale for each proposed condition and prescription.[73] This rationale must include factual evidence—rather than conclusions—in support of its conditions and prescriptions.[74] A licensee may then challenge the factual underpinnings of this factual support. The Departments cannot then argue that a fact is immaterial to avoid a trial-type hearing on the issue.

The ALJs have recognized that couching disputed issues as policy matters hinders the licensee's right under EPAct 2005 to resolution of factual issues underlying proposed mandatory conditions and prescriptions. Nevertheless, the Departments in the Revised Rules endorse an overbroad definition of policy issues that is inconsistent with the statute. The Departments should revisit their interpretation and acknowledge in further revised rules that, while the ALJ should not make any policy judgments on what conditions or prescriptions should ultimately be included in the license, all disputed scientific facts, whether related to existing conditions or

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[72] *See, e.g.*, http://www.cod.edu/people/faculty/fancher/scimeth.htm and https://explorable.com/prediction-in-research.

[73] *See* 7 C.F.R. § 1.620(a).

[74] *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996).

prescriptions or the possible impacts of proposed measures under the license, are appropriate for resolution by an ALJ.

In the preamble to the Revised Rules, the Departments state that disputed issues of fact with respect to alternatives to conditions and prescriptions are not "material" issues and should not be resolved by the ALJ.[75] However, if the Departments, in the course of issuing preliminary conditions and prescriptions, considered and rejected other potential conditions and prescriptions, the scientific justification for why those options were rejected is material to the Departments' decision to require the conditions and prescriptions they ultimately select. For instance, if a Department during its preliminary consideration explored fish prescriptions including trap and haul and fish ladders, but ultimately selects trap and haul, the Department's reasoning for not selecting fish ladders is relevant to its decision to select trap and haul. This does not "blur the distinction" between the trial-type hearing and the alternatives process under Section 33. Disputed issues with respect to alternatives considered and rejected by a Department are material facts that should be resolved by an ALJ.

G. Prohibition on Forum-Shopping

The Revised Rules do nothing to address previous comments on the Departments' influence in selecting a venue and ALJ for a trial-type hearing. These issues continue to put licensees and other non-federal parties at a disadvantage in these proceedings.

1. Venue

Under the rules, the Departments have undue influence over selecting a location for trial that is most convenient for them. The rules lack any criteria for the selection of a convenient venue for all parties to the proceeding. For example, in the FERC Project No. 2206 proceeding, the licensee, based out of Raleigh, North Carolina and with counsel in Birmingham, Alabama,

[75] Revised Rules at 17,178.

was assigned a Coast Guard ALJ based in Portland, Oregon. In the FERC Project No. 2082 proceeding, the licensee, based out of Portland, Oregon and with counsel in Washington, DC, was assigned an ALJ in Sacramento, California. The inconvenient trial locations selected in these cases presented a logistical challenge to the licensees, who had to travel not only for the trial, but for the pre-hearing conference as well. The ALJ should decide the location of the trial based on balancing the convenience to all parties, not just to the Departments. Industry Commenters have proposed revisions to the regulations to incorporate this standard. *See* § 1.640(h).

2. Selection of ALJ

A larger problem exists with the Departments' undue influence over the selection of ALJs in trial-type proceedings. Under the rules, the Departments have great latitude in assigning an ALJ from a Department tasked with defending its conditions or prescriptions. The Department should not be allowed to hand pick a Department ALJ or an ALJ with a track record favorable to the Departments. A basic principle of jurisprudence is that parties to litigation cannot select the judge to hear their case.

There are two potential remedies to cure the flaw in the current system for selecting ALJs. First, a lottery system could be used to select an ALJ. This would ensure that the ALJ is selected completely at random, and would prevent undue influence by the Departments. In order for an ALJ in a nearby geographic region to be assigned to the case, the lottery would only include judges in the geographic region of the project. In the alternative, the ALJ could travel to a convenient location for the parties and hold the hearing in a local facility.

A more favorable solution would be to eliminate the use of agency ALJs altogether and instead the Departments should request FERC to appoint a FERC ALJ to conduct trial-type

hearings. The use of FERC ALJs is a more neutral and logical choice of adjudicator for all parties. FERC is not a party to a trial-type hearing. FERC ALJs are more likely to have the technical expertise on hydroelectric issues, so the learning curve for the judge, who is already under severe time constraints under the rules, is reduced. Despite receiving comments suggesting the use of FERC ALJs, the Departments do not address this in the Revised Rules.

The Departments should implement one of these alternatives in the Revised Rules. Industry Commenters have included both options in Section 1.630.

H. Improvements to the Hearing Timeline

Industry Commenters commend the Departments for extending several deadlines in the trial-type hearing process to ease the burden on parties to the process. In particular, the revisions to allow an ALJ decision to be issued outside of the 90-day hearing period will go far to improve the process. However, for other parties to the hearing, several extensions of five days each do not go far enough to relieve the extreme hardships of the compressed timeline set out in the rules. EPAct 2005 does not require such a condensed schedule, and there is still room for adjustments to allow more flexibility in the process. Not only does the current timeline impose extreme hardships on the parties, it also results in the impairment of parties' ability to exercise their statutory rights. As a practical matter, the schedule forces parties challenging agency conditions and prescriptions to limit the scope of their challenges, because the schedule simply will not permit litigation of more than a handful of issues. This cannot have been Congress's intent.

Industry Commenters believe that the Departments have ample leeway under EPAct 2005, and are affirmatively required by the APA, to shift the deadlines in the rules to make the process fairer and alleviate the severe burdens on the parties. Moreover, this can be done without significantly delaying the licensing process. First, the Departments should reconsider

previous comments urging the deadline for filing hearing requests and proposed alternatives to change from 30 days to 45 days from the date the Department issues its preliminary condition or prescription. While the Departments argue that a 30-day deadline "provides several benefits for the parties, FERC, and the Departments,"[76] in reality these benefits are provided to the severe detriment to all parties except the Departments. The drafting of the request for hearing is arguably one of the most important—and time-intensive—tasks of the entire hearing process, and the rules provide parties only one opportunity to define their disputed issues. The hearing request must also include a list of witnesses and exhibits, which takes time to compile.[77] Moreover, a 45-day deadline is consistent with FERC's regulations, which provide the parties with 45 days to respond to preliminary conditions and prescriptions.[78] The revised final rules should allow 45 days for this filing. In addition, the rules should provide parties with the ability to supplement their list of studies and exhibits after the hearing request is filed. For example, an amended list of studies and exhibits could be required on the date of the pre-hearing conference. These revisions appear in Section 1.621.

Second, the Departments should reconsider previous comments suggesting that Departments have flexibility under the plain language of EPAct 2005 to allow a 90-day hearing for each agency in the event of two unconsolidated hearing requests, thus allowing hearings involving two agencies to last up to 180 days. The Interim Rules provided criteria for when the Departments "may" consolidate hearing requests—if there are common issues of material fact—but the Departments are not required to consolidate in any case. The final rules should mandate that common issues of material fact must be consolidated. In the event that the hearings are not

[76] Revised Rules at 17,174 (citing Interim Rules at 69,807).

[77] *See* 7 C.F.R. § 1.621(c).

[78] 18 C.F.R. § 5.23 (2014).

consolidated, the final rule should clarify that such hearings will be held consecutively, and not simultaneously, with each individual hearing allotted its own 90-day window. Simultaneous hearings at multiple Departments poses significant challenges for all parties involved, and because EPAct 2005 allows a 90-day hearing for each Department, there is no reason to unnecessarily constrain the hearings into a 90-day window. Given that licensing proceedings take many years to complete, providing for a proportional extension of time according to the number of unconsolidated hearing requests would not unreasonably delay the licensing proceeding.

These revisions appear in Sections 1.623(c)(3) and 1.623(d).

I. Stay of Case for Settlement

Industry Commenters are greatly supportive of the new provision in the Revised Rules allowing a stay of the trial-type proceeding of up to 120 days to facilitate settlement negotiations.[79] This was a much-needed improvement to the rules that could potentially lead to resolution of all disputed issues among the parties and alleviate the need for a formal trial.

While Industry Commenters support the revisions to the rules on this issue, the rules currently only allow a stay before a case is referred to the ALJ.[80] The Departments should revise the rule to permit settlement negotiations among licensees and the Departments after the conclusion of the trial-type hearing but before the Departments issue modified conditions and prescriptions. At least one Department has opined that it was prohibited from post-hearing negotiations under *ex parte* principles. Settlements should be encouraged at all points in the hearing process. The hearing determines disputed facts, not the modified conditions and prescriptions. Determining modified conditions and prescriptions (subject to the ALJ's fact

[79] Revised Rules at 17,156, 17,165.

[80] *See id.* at 17,186 (7 C.F.R. § 1.624 (as proposed)).

findings) remains within the Departments' discretion after trial. The Revised Rules should therefore explicitly state that *ex parte* considerations do not prohibit Departments from engaging in settlement negotiations during the time between the ALJ's decision and issuance of the Departments' modified conditions and prescriptions. *See* proposed revisions in Section 1.624(c).

J. Other Minor Modifications

There are several other minor modifications to the rules that commenters proposed and the Departments rejected. Industry Commenters ask that the Departments reconsider these proposals.

1. Discovery. The Interim Rules provide that discovery shall be obtained "[b]y agreement of the parties or with the permission of the ALJ . . . ."[81] Several commenters asked the Departments to clarify that discovery can start upon filing the request for a trial-type hearing even without agreement of the parties or approval by the ALJ, and that requiring authorization from an ALJ or agreement of the parties needlessly limits and delays discovery in a way that compromises the parties' discovery rights.[82] The Departments rejected these comments, finding that no changes to the discovery provisions were necessary.[83] Industry Commenters ask the Departments to reconsider their conclusion that the discovery provisions of the rules do not require revisions. Section 241 of EPAct 2005 specifically provides for discovery, not that such discovery must be first authorized by the parties or the ALJ. Under the current rules, discovery is not guaranteed, as required by EPAct 2005. Moreover, Industry Commenters continue to believe that the discovery rules should follow FERC's regulations

81 7 C.F.R. § 1.641(a).

82 *See, e.g.,* NHA and EEI Comments at 23.

83 Revised Rules at 17,168-69.

regarding discovery in proceedings set for hearing.[84] Under FERC's regulations, parties may obtain discovery without involvement of the ALJ, unless there are discovery disputes. Industry Commenters recommend that the Departments employ a similar discovery approach for Section 241 trial-type hearings.

2. Page Limitations. The Interim Rules imposed a two-page limitation for each material disputed fact in a hearing request, and a one-page limitation for witness and exhibit identification. Several commenters requested that the page limit per disputed fact be increased from two to five pages, and the page limit for witness and exhibit identification be increased from one to three pages.[85] In the Revised Rules, the Departments refused to increase the page limitation, though they clarified that the required list of citations to supporting information and the list of exhibits need not be included in the page restriction.[86] While Industry Commenters appreciate the Departments' modification to this rule, they maintain that two pages per issue is entirely insufficient to adequately convey all of the information regarding disputed material facts that is required by the Departments in their regulations. Similarly, the one-page limit regarding witnesses and exhibits as well as summaries of their testimony is too short. A small increase in these page limitations would permit license parties to adequately respond to the Departments' requirements for information but would still provide for expedited review and response by the Departments. *See* proposed revisions in Section 1.621(d).

3. Electronic Filing. The Interim Rule provided that documents may be filed by hand delivery, express mail, courier service, or facsimile. Several commenters requested that

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84 18 C.F.R. § 385.402(a).

85 NHA and EEI Comments at 26.

86 Revised Rules at 17,164.

electronic filing and service be permitted.[87] In the Revised Rules, the Departments adopted the comments as to electronic service but not as to electronic filing, noting that the Departments and their ALJ offices do not have the ability to accept and to print large documents filed electronically.[88] Industry Commenters continue to believe that electronic filing should be allowed in trial-type proceedings in the interest of efficiency and reduced waste. Industry Commenters agree that the hearing request and all documents filed prior to case referral should be filed by hand delivery, express mail, courier service, or facsimile under Section 1.612(b). However, once a Department refers a case to an ALJ under Section 1.626, the ALJ should have discretion under the rules to set a preferred method of filing, including filing by electronic methods. An ALJ has already done this in at least one proceeding. In that case before a Coast Guard ALJ in 2006, all parties agreed during the pre-hearing conference to allow filing of documents by electronic mail, with a hard copy of the filing to be sent to by regular mail on the same day. The ALJ granted the request and designated an email address for electronic filing.[89] *See* proposed revisions in Section 1.612(b).

K. Time Frame for Issuance of Further Revised Final Rules

The preamble to the Revised Rules states that the Departments will consider promulgating further revised final rules based on the comments received.[90] The Departments included similar language in the Interim Rules issued in 2005, and it took nearly 10 years thereafter to issue the Revised Rules. Given that history, Industry Commenters request that the Departments commit to issuing further revised final rules by December 31, 2015 to avoid the

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87 NHA and EEI Comments at 24.

88 Revised Rules at 17,161-62.

89 Order Granting, in Part, PacifiCorp's Motion for Electronic Filing of Documents, Docket No. 2006-NMFS-0001 (issued July 6, 2006).

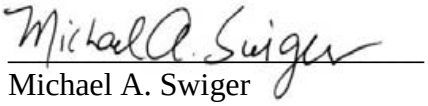
90 Revised Rules at 17,157.

application of flawed rules to proceedings utilizing the procedures before that time, to prevent the disruption of license proceedings utilizing the current version of the rules, and to provide regulatory certainty to all parties involved in both future and pending license proceedings. Industry Commenters believe it is reasonable to request that the Departments issue final rules as soon as possible after receiving comments on the Revised Rules, and in any event no later than December 31, 2015.

III. CONCLUSION

For the foregoing reasons, Industry Commenters respectfully request that the Department adopt the recommendations in the comments set forth above.

Respectfully submitted,



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Title 7—Department of Agriculture

PART 1—ADMINISTRATIVE REGULATIONS

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301, unless otherwise noted.

■ 2. Revise subpart O to read as follows:

Subpart O—Conditions in FERC Hydropower Licenses

Authority: 16 U.S.C. 797(e), 811, 823d.

General Provisions

Sec.

Hearing Process

Representatives

Document Filing and Service

Initiation of Hearing Process

General Provisions Related to Hearings

Prehearing Conferences and Discovery

Hearing, Briefing, and Decision

Alternatives Process

General Provisions

§ 1.601 What is the purpose of this subpart, and to what license proceedings does it apply?

(a) *Hearing process.* (1) The regulations in §§ 1.601 through 1.660 contain rules of practice and procedure applicable to hearings on disputed issues of material fact with respect to mandatory conditions that the Department of Agriculture, Forest Service (Forest Service) may develop for inclusion in a hydropower license issued under subchapter I of the Federal Power Act (FPA), 16 U.S.C. 791 *et seq.* The authority to develop these conditions is granted by FPA section 4(e), 16 U.S.C. 797(e), which authorizes the Secretary of Agriculture to condition hydropower licenses issued by the Federal Energy Regulatory Commission (FERC).

(2) The hearing process under this part does not apply to recommendations that the Forest Service may submit to FERC under FPA section 10(a), 16 U.S.C. 803(a).

(3) The FPA also grants the Department of Commerce and the Department of the Interior the authority to develop mandatory conditions and prescriptions for inclusion in a hydropower license. Where the Forest Service and either or both of these other Departments develop conditions or prescriptions to be included in the same hydropower license and where the Departments agree to consolidate the hearings under § 1.623:

(i) A hearing conducted under this subpart will also address disputed issues of material fact with respect to any condition or prescription developed by one of the other Departments; or

(ii) A hearing requested under this subpart will be conducted by one of the other Departments, pursuant to 43 CFR 45.1 *et seq.* or 50 CFR 221.1 *et seq.*, as applicable.

(4) The regulations in §§ 1.601 through 1.660 will be construed and applied to each hearing process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved and the provisions of § 1.660(a).

(b) *Alternatives process.* The regulations in §§ 1.670 through 1.674 contain rules of procedure applicable to the submission and consideration of alternative conditions under FPA section 33, 16 U.S.C. 823d. That section allows any party to the license proceeding to propose an alternative to a condition deemed necessary by the Forest Service under section 4(e).

(c) *Reserved authority.* Where the Forest Service has notified or notifies FERC that it is reserving its authority to develop one or more conditions at a later time, the hearing and alternatives processes under this subpart for such conditions will be available if and when the Forest Service exercises its reserved authority to require new or modified conditions.

(d) *Applicability.* (1) This subpart applies to any hydropower license proceeding for which the license had not been issued as of November 17, 2005, and for which one or more preliminary conditions have been or are filed with FERC before FERC issues the license.

(2) This subpart also applies to any exercise of the Forest Service's reserved authority under paragraph (c) of this section with respect to a hydropower license issued before or after November 17, 2005.

§ 1.602 What terms are used in this subpart?

As used in this subpart:

ALJ means an administrative law judge appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process under this subpart.

Alternative means a condition that a license party other than the Forest Service or another Department develops as an alternative to a preliminary condition from the Forest Service or another Department, under FPA sec. 33, 16 U.S.C. 823d.

Condition means a condition under FPA sec. 4(e), 16 U.S.C. 797(e), for the adequate protection and utilization of a reservation.

Day means a calendar day.

Department means the Department of Agriculture, Department of Commerce, or Department of the Interior.

Discovery means a prehearing process for obtaining facts or information to assist a party in preparing or presenting its case.

Ex parte communication means an oral or written communication to the ALJ that is made without providing all parties reasonable notice and an opportunity to participate.

FERC means the Federal Energy Regulatory Commission.

Forest Service means the USDA Forest Service.

FPA means the Federal Power Act, 16 U.S.C. 791 *et seq.*

Hearing Clerk means the Hearing Clerk, OALJ, USDA, 1400 Independence Ave., SW., Washington, DC 20250; phone: 202–720–4443, facsimile: 202–720–9776.

Intervention means a process by which a person who did not request a hearing under § 1.621 can participate as a party to the hearing under § 1.622.

License party means a party to the license proceeding, as that term is defined at 18 CFR 385.102(c).

License proceeding means a proceeding before FERC for issuance of a license for a hydroelectric facility under 18 CFR part 4 or 5.

Material fact means a fact that, if proved, may affect a Department's decision whether to affirm, modify, or withdraw any condition or prescription.

Modified condition or prescription means any modified condition or prescription filed by a Department with FERC for inclusion in a hydropower license.

NEPA document means an environmental document as defined at 40 CFR 1508.10 to include an environmental assessment, environmental impact statement (EIS), finding of no significant impact, and notice of intent to prepare an EIS. Such documents are issued to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq., and the CEQ Regulations Implementing the Procedural Requirements of NEPA (40 CFR parts 21500–1508).*

NFS means the National Forest System and refers to:

(1) Federal land managed by the Forest Service; and

(2) The Deputy Chief of the National Forest System, located in the Forest Service's Washington, DC, office.

Office of Administrative Law Judges (OALJ) is the office within USDA in which ALJs conduct hearings under the regulations in this subpart.

Party means, with respect to USDA's hearing process:

(1) A license party that has filed a timely request for a hearing under: (i) Section 1.621; or

(ii) Either 43 CFR 45.21 or 50 CFR 221.21, with respect to a hearing process consolidated under § 1.623;

(2) A license party that has filed a timely notice of intervention and response under:

(i) Section 1.622; or

(ii) Either 43 CFR 45.22 or 50 CFR 221.22, with respect to a hearing process consolidated under § 1.623;

(3) The Forest Service; and

(4) Any other Department that has filed a preliminary condition or prescription, with respect to a hearing process consolidated under § 1.623.

Person means an individual; a partnership, corporation, association, or other legal entity; an unincorporated organization; and any Federal, State,

Tribal, county, district, territorial, or local government or agency.

Preliminary condition or prescription means any preliminary condition or prescription filed by a Department with FERC for potential inclusion in a hydropower license.

Prescription means a fishway prescribed under FPA sec. 18, 16 U.S.C. 811, to provide for the safe, timely, and effective passage of fish.

Representative means a person who:

(1) Is authorized by a party to represent the party in a hearing process under this subpart; and

(2) Has filed an appearance under § 1.610.

Reservation has the same meaning as the term ''reservations'' in FPA sec. 3(2), 16 U.S.C. 796(2).

Secretary means the Secretary of Agriculture or his or her designee.

Senior Department employee has the same meaning as the term ''senior employee'' in 5 CFR 2637.211(a).

USDA means the United States Department of Agriculture.

You refers to a party other than a Department.

§ 1.603 How are time periods computed?

(a) *General.* Time periods are computed as follows:

(1) The day of the act or event from which the period begins to run is not included.

(2) The last day of the period is included.

(i) If that day is a Saturday, Sunday, or Federal holiday, the period is extended to the next business day.

(ii) The last day of the period ends at 5 p.m. at the place where the filing or other action is due.

(3) If the period is less than 7 days, any Saturday, Sunday, or Federal holiday that falls within the period is not included.

(b) *Extensions of time.* (1) No extension of time can be granted to file a request for a hearing under § 1.621, a notice of intervention and response under § 1.622, an answer under § 1.625, or any document under §§ 1.670 through 1.674.

(2) An extension of time to file any other document under this subpart may be granted only upon a showing of good cause.

(i) To request an extension of time, a party must file a motion under § 1.635 stating how much additional time is needed and the reasons for the request.

(ii) The party must file the motion before the applicable time period expires, unless the party demonstrates extraordinary circumstances that justify a delay in filing.

(iii) The ALJ may grant the extension only if:

(A) It would not unduly prejudice other parties; and

(B) It would not delay the decision under § 1.660.

§ 1.604 What deadlines apply to the trial-type hearing and alternatives processes?

(a) The following table summarizes the steps in the trial-type hearing process under this subpart and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this subpart or by the ALJ, the deadlines as set by those other sections or by the ALJ control.

Process step	Process day	Must generally be completed	See section
(1) Forest Service files preliminary condition(s) with FERC.	0	.....	1.620.
(2) License party files request for hearing	30	Within ~~30~~45 days after Forest Service files preliminary condition(s) with FERC.	1.621(a).
(3) Any other license party files notice of intervention and response.	50	Within 20 days after deadline for filing requests for hearing. Within 55 days after deadline for filing requests for hearing.	1.622(a).
(4) NFS refers case to ALJ office for hearing and issues referral notice to parties.	85	Before deadline for filing motions seeking discovery ..	1.626(a).
(5) Parties may meet and agree to discovery (optional step).	86–91	Within 5 days after effective date of referral notice	1.641(a).
(6) ALJ office sends docketing notice, and ALJ issues notice setting date for initial prehearing conference.	90	Within 7 days after effective date of referral notice	1.630.
(7) Party files motion seeking discovery from another party.	92	Within 7 days after service of discovery motion	1.641(d).
(8) Other party files objections to discovery motion or specific portions of discovery requests.	99	Before date set for initial prehearing conference	1.641(e).
(9) Parties meet to discuss discovery and hearing schedule.	100–104	On or about 20th day after effective date of referral notice.	1.640(d).
(10) ALJ conducts initial prehearing conference	105	Within 2 days after initial prehearing conference	1.640(a).
(11) ALJ issues order following initial prehearing conference.	107	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	1.640(g).
(12) Party responds to interrogatories from another party as authorized by ALJ.	120–22	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	1.643(c).
(13) Party responds to requests for documents, etc., from another party as authorized by ALJ.	120–22	Within 25 days after initial prehearing conference	1.645(c).
(14) Parties complete all discovery, including depositions, as authorized by ALJ.	130	Within 10 days after deadline for completion of dis- covery. Within 10 days after deadline for completion of dis- covery.	1.641(i).
(15) Parties file updated lists of witnesses and exhib- its.		Within 25 days after deadline for completion of dis- covery.	
(16) Parties file written direct testimony	140	When ALJ closes hearing ..... Within 15 days after hearing closes	1.642(b).
(17) Parties complete prehearing preparation and ALJ commences hearing.	140	Within 30 days after hearing closes	1.652(a).
(18) ALJ closes hearing record ..... (19) Parties file post-hearing briefs ..... (20) ALJ issues decision	155 160 175 190		1.650(a). 1.658. 1.659(a). 1.660(a).

(b) The following table summarizes the steps in the alternatives process under this subpart and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this subpart, the deadlines as set by those other sections control.

Process step	Process day	Must generally be completed	See section
(1) Forest Service files preliminary condition(s) with FERC.	0	.....	1.620.
(2) License party files alternative condition(s)	30	Within ~~30~~45 days after Forest Service files preliminary condition(s) with FERC.	1.671(a).
(3) ALJ issues decision on any hearing request ..... (4)	190	Within 30 days after hearing closes (see previous table).	1.660(a).
License party files revised alternative condition(s) if authorized.	210	Within ~~26~~0 days after ALJ issues decision	1.672(a).
(5) Forest Service files modified condition(s) with FERC.	300	Within 60 days after the deadline for filing comments on FERC's draft NEPA document.	1.673(a).

Hearing Process

Representatives

§ 1.610 Who may represent a party, and what requirements apply to a representative?

(a) *Individuals.* A party who is an individual may either represent himself or herself in the hearing process under this subpart or authorize an attorney to represent him or her.

(b) *Organizations.* A party that is an organization or other entity may authorize one of the following to represent it:

(1) An attorney;

(2) A partner, if the entity is a partnership;

(3) An officer or agent, if the entity is a corporation, association, or unincorporated organization;

(4) A receiver, administrator, executor, or similar fiduciary, if the entity is a receivership, trust, or estate; or

(5) An elected or appointed official or an employee, if the entity is a Federal, State, Tribal, county, district, territorial, or local government or component.

(c) *Appearance.* An individual representing himself or herself and any other representative must file a notice of appearance. The notice must:

(1) Meet the form and content requirements for documents under § 1.611;

(2) Include the name and address of the party on whose behalf the appearance is made;

(3) If the representative is an attorney, include a statement that he or she is a member in good standing of the bar of the highest court of a state, the District of Columbia, or any territory or commonwealth of the United States (identifying which one); and

(4) If the representative is not an attorney, include a statement explaining his or her authority to represent the entity.

(d) *Lead representative.* If a party has more than one representative, the ALJ may require the party to designate a lead representative for service of documents under § 1.613.

(e) *Disqualification.* The ALJ may disqualify any representative for misconduct or other good cause.

Document Filing and Service

§ 1.611 What are the form and content requirements for documents under this subpart?

(a) *Form.* Each document filed in a case under §§ 1.610 through 1.660 must:

(1) Measure 8 1/2 by 11 inches, except that a table, chart, diagram, or other attachment may be larger if folded to 8 1/2 by 11 inches and attached to the document;

(2) Be printed on just one side of the page (except that service copies may be printed on both sides of the page);

(3) Be clearly typewritten, printed, or otherwise reproduced by a process that yields legible and permanent copies;

(4) Use 11 point font size or larger;

(5) Be double-spaced except for footnotes and long quotations, which may be single-spaced;

(6) Have margins of at least 1 inch; and

(7) Be bound on the left side, if bound.

(b) *Caption.* Each document filed under §§ 1.610 through 1.660 must begin with a caption that sets forth: (1) The name of the case under §§ 1.610 through 1.660 and the docket number, if one has been assigned;

(2) The name and docket number of the license proceeding to which the case under §§ 1.610 through 1.660 relates; and

(3) A descriptive title for the document, indicating the party for whom it is filed and the nature of the document.

(c) *Signature.* The original of each document filed under §§ 1.610 through 1.660 must be signed by the representative of the person for whom the document is filed. The signature constitutes a certification by the representative that he or she has read the document; that to the best of his or her knowledge, information, and belief, the statements made in the document are true; and that the document is not being filed for the purpose of causing delay.

(d) *Contact information.* Below the representative's signature, the document must provide the representative's name, mailing address, street address (if different), telephone number, facsimile number (if any), and electronic mail address (if any).

§ 1.612 Where and how must documents be filed?

(a) *Place of filing.* Any documents relating to a case under §§ 1.610 through 1.660 must be filed with the appropriate office, as follows:

(1) Before NFS refers a case for docketing under § 1.626, any documents must be filed with NFS by directing them to the ''Deputy Chief, NFS.''

(i) For delivery by regular mail, address to USDA Forest Service, Attn: Lands Staff, Mail Stop 1124, 1400 Independence Ave. SW., Washington, DC 20250–1124.

(ii) For delivery by hand or private carrier, deliver to USDA Forest Service, Yates Bldg. (4 SO), 201 14th Street SW., Washington, DC (SW. corner of 14th Street and Independence Ave. SW.); phone (202) 205–1248; facsimile (703) 605–5117. Hand deliverers must obtain an official date-time-stamp from Lands Staff.

(2) The Forest Service will notify the parties of the date on which NFS refers a case for docketing under § 1.626. After that date, any documents must be filed with:

(i) The Hearing Clerk, if OALJ will be conducting the hearing. The Hearing Clerk's address, telephone number, and facsimile number are set forth in § 1.602; or

(ii) The hearings component of or used by another Department, if that Department will be conducting the

hearing. The name, address, telephone number, and facsimile number of the appropriate hearings component will be provided in the referral notice from the Forest Service.

(b) *Method of filing.* (1) Prior to case referral to an ALJ under § 1.626(a), Aa document must be filed with the appropriate office under paragraph (a) of this section using one of the following methods:

(i) By hand delivery of the original document and two copies;

(ii) By sending the original document and two copies by express mail or courier service; or

(iii) By sending the document by facsimile if:

(A) The document is 20 pages or less, including all attachments;

(B) The sending facsimile machine confirms that the transmission was successful; and

(C) The original of the document and two copies are sent by regular mail on the same day.

(2) After case referral to an ALJ under § 1.626(a), the ALJ may designate the preferred method of filing, which may include filing by electronic mail.

(23) Parties are encouraged, and may be required by the ALJ, to supplement any filing by providing the appropriate office with an electronic copy of the document on compact disc or other suitable media. With respect to any supporting material accompanying a request for hearing, a notice of intervention and response, or an answer, the party may submit in lieu of an original and two hard copies:

(i) An original; and

(ii) One copy on a compact disc or other suitable media.

(c) *Date of filing.* A document under this subpart is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(d) *Nonconforming documents.* If any document submitted for filing under this subpart does not comply with the requirements of this subpart or any applicable order, it may be rejected.

§ 1.613 What are the requirements for service of documents?

(a) *Filed documents.* Any document related to a case under §§ 1.610 through 1.660 must be served at the same time the document is delivered or sent for filing. Copies must be served as follows:

(1) A complete copy of any request for a hearing under § 1.621 must be delivered or sent to FERC and each license party, using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service.

(2) A complete copy of any notice of intervention and response under § 1.622 must be:

(i) Delivered or sent to FERC, the license applicant, any person who has filed a request for hearing under § 1.621, and the Forest Service office that submitted the preliminary conditions to FERC, using one of the methods of service in paragraph (c) of this section; and

(ii) Delivered or sent to any other license party using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service, or by regular mail.

(3) A complete copy of any answer or notice under § 1.625 and any other document filed by any party to the hearing process must be delivered or sent to every other party to the hearing process, using one of the methods of service in paragraph (c) of this section.

(b) *Documents issued by the Hearing Clerk or ALJ.* A complete copy of any notice, order, decision, or other document issued by the Hearing Clerk or the ALJ under §§ 1.610 through 1.660 must be served on each party, using one of the methods of service in paragraph (c) of this section.

(c) *Method of service.* Unless otherwise agreed to by the parties and ordered by the ALJ, service must be accomplished by one of the following methods:

(1) By hand delivery of the document; (2) By sending the document by express mail or courier service for delivery on the next business day;

(3) By sending the document by facsimile if:

(i) The document is 20 pages or less, including all attachments;

(ii) The sending facsimile machine confirms that the transmission was successful; and

(iii) The document is sent by regular mail on the same day; or

(4) By sending the document, including all attachments, by electronic means if the party to be served has consented to that means of service in writing. However, if the serving party learns that the document did not reach the party to be served, the serving party must re-serve the document by another method set forth in paragraph (c) of this section (including another electronic means, if the party to be served has consented to that means in writing).

(d) *Certificate of service.* A certificate of service must be attached to each document filed under §§ 1.610 through 1.660. The certificate must be signed by the party's representative and include the following information:

(1) The name, address, and other contact information of each party's representative on whom the document was served;

(2) The means of service, including information indicating compliance with paragraph (c)(3) or (c)(4) of this section, if applicable; and

(3) The date of service.

Initiation of Hearing Process

§ 1.620 What supporting information must the Forest Service provide with its preliminary conditions?

(a) *Supporting information.* (1) When the Forest Service files its preliminary conditions with FERC, it must include a rationale for each condition, explaining why the Forest Service deems the condition necessary for the adequate protection and utilization of the affected NFS lands, and an index to the Forest Service's administrative record that identifies all documents relied upon.

(2) If any of the documents relied upon are not already in the license proceeding record, the Forest Service must:

(i) File them with FERC at the time it files its preliminary conditions; and

(ii) Provide copies to the license applicant.

(b) *Service.* The Forest Service will serve copies of its preliminary conditions on each license party.

§ 1.621 How do I request a hearing?

(a) *General.* To request a hearing on disputed issues of material fact with respect to any preliminary condition filed by the Forest Service, you must:

(1) Be a license party; and

(2) File with NFS, at the appropriate address provided in § 1.612(a)(1), a written request for a hearing:

(i) For a case under § 1.601(d)(1), within 3045 days after the Forest Service files a preliminary condition with FERC; or

(ii) For a case under § 1.601(d)(2), within 60 days after the Forest Service files a preliminary condition with FERC.

(b) *Content.* Your hearing request must contain:

(1) A numbered list of the factual issues that you allege are in dispute, each stated in a single, concise sentence; (2) The following information with respect to each issue:

(i) The specific factual statements made or relied upon by the Forest Service under § 1.620(a) that you dispute;

(ii) The basis for your opinion that those factual statements are unfounded or erroneous; and

(iii) The basis for your opinion that any factual dispute is material.

(3) With respect to any scientific studies, literature, and other

documented information supporting your opinions under paragraphs (b)(2)(ii) and (b)(2)(iii) of this section, specific citations to the information relied upon. If any such document is not already in the license proceeding record, you must provide a copy with the request. Parties may supplement their list of scientific studies, literature, and other information provided pursuant to this section any time before the date of the pre-hearing conference; and

(4) A statement indicating whether or not you consent to service by electronic means under § 1.613(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your hearing request must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(2) of this section may not exceed ~~two~~ five pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed ~~one~~ two pages.

§ 1.622 How do I file a notice of intervention and response?

(a) *General.* (1) To intervene as a party to the hearing process, you must:

(i) Be a license party; and

(ii) File with NFS, at the appropriate address provided in § 1.612(a)(1), a notice of intervention and a written response to any request for a hearing within 20 days after the deadline in § 1.621(a)(2).

(2) A notice of intervention and response must be limited to one or more of the issues of material fact raised in the hearing request and may not raise additional issues.

(b) *Content.* In your notice of intervention and response you must explain your position with respect to the issues of material fact raised in the hearing request under § 1.621(b).

(1) If you agree with the information provided by the Forest Service under § 1.620(a) or by the requester under § 1.621(b), your response may refer to the Forest Service's explanation or the requester's hearing request for support.

(2) If you wish to rely on additional information or analysis, your response must provide the same level of detail with respect to the additional information or analysis as required under § 1.621(b).

(3) Your notice of intervention and response must also indicate whether or not you consent to service by electronic means under § 1.613(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your response and notice must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony; and

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b) of this section (excluding citations to scientific studies, literature, and other documented information supporting your opinions) may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 1.623 Will hearing requests be consolidated?

(a) *Initial Department coordination.* If NFS has received a copy of a hearing request, it must contact the other Departments and determine:

(1) Whether any of the other Departments has also filed a preliminary condition or prescription relating to the license with FERC; and

(2) If so, whether the other Department has also received a hearing request with respect to the preliminary condition or prescription.

(b) *Decision on consolidation.* Where more than one Department has received a hearing request, the Departments involved must decide jointly:

(1) Whether the cases should be consolidated for hearing under paragraphs (c)(3)(ii) through (iv) of this section; and

(2) If so, which Department will conduct the hearing on their behalf.

(c) *Criteria.* Cases will or may be consolidated as follows:

(1) All hearing requests with respect to any conditions from the same Department will be consolidated for hearing.

(2) All hearing requests with respect to any prescriptions from the same Department will be consolidated for hearing.

(3) All or any portion of the following ~~may~~ must be consolidated for hearing, if the Departments involved determine that there are common issues of material fact or that consolidation is otherwise appropriate:

(i) Two or more hearing requests with respect to any condition and any prescription from the same Department;

(ii) Two or more hearing requests with respect to conditions from different Departments;

(iii) Two or more hearing requests with respect to prescriptions from different Departments; or

(iv) Two or more hearing requests with respect to any condition from one Department and any prescription from another Department.

(d) If the Departments do not consolidate hearing requests before two Departments, the parties will have up to 180 days to complete the hearing process. If the Departments do not consolidate hearing requests before three Departments, the parties will have up to 270 days to complete the hearing process. These time periods will apply in lieu of the 90-day hearing timeline set forth in § 1.601(a)(4).

§ 1.624 Can a hearing process be stayed to allow for settlement discussions?

(a) Prior to referral to the ALJ, the hearing requester and the Forest Service may by agreement stay the hearing process under this subpart for a period not to exceed 120 days to allow for settlement discussions, if the stay period and any subsequent hearing process (if required) can be accommodated within the time frame established for the license proceeding.

(b) Any stay of the hearing process will not affect the deadline for filing a notice of intervention and response, if any, pursuant to § 1.622(a)(1)(ii).

(c) Ex parte considerations do not prohibit the Department from engaging in settlement negotiations during the time between the ALJ's decision and issuance of the Department's ~~final~~modified conditions.

§ 1.625 How will the Forest Service respond to any hearing requests?

(a) *General.* NFS will determine whether to answer any hearing request under § 1.621 on behalf of the Forest Service.

(b) *Content.* If NFS answers a hearing request:

(1) For each of the numbered factual issues listed under § 1.621(b)(1), NFS's answer must explain the Forest Service's position with respect to the issues of material fact raised by the requester, including one or more of the following statements as appropriate:

(i) That the Forest Service is willing to stipulate to the facts as alleged by the requester;

(ii) That the Forest Service believes the issue listed by the requester is not a factual issue, explaining the basis for such belief;

(iii) That the Forest Service believes the issue listed by the requester is not material, explaining the basis for such belief; or

(iv) That the Forest Service agrees that the issue is factual, material, and in dispute.

(2) NFS's answer must also indicate whether the hearing request will be consolidated with one or more other hearing requests under § 1.623 and, if so:

(i) Identify any other hearing request that will be consolidated with this hearing request; and

(ii) State which Department will conduct the hearing and provide contact

information for the appropriate Department hearings component.

(3) If the Forest Service plans to rely on any scientific studies, literature, and other documented information that are not already in the license proceeding record, a copy of each item must be provided with NFS's answer.

(4) NFS's answer must also indicate whether or not the Forest Service consents to service by electronic means under § 1.613(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* NFS's answer must also contain a list of the Forest Service's witnesses and exhibits that the Forest Service intends to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, the Forest Service must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, the Forest Service must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(1) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

(e) *Notice in lieu of answer.* If NFS elects not to answer a hearing request: (1) The Forest Service is deemed to agree that the issues listed by the requester are factual, material, and in dispute;

(2) The Forest Service may file a list of witnesses and exhibits with respect to the request only as provided in § 1.642(b); and

(3) NFS must include with its case referral under § 1.623 a notice in lieu of answer containing the information required by paragraph (b)(2) of this section, if the hearing request will be consolidated with one or more other hearing requests under § 1.623, and the statement required by paragraph (b)(4) of this section.

§ 1.626 What will the Forest Service do with any hearing requests?

(a) *Case referral.* Within 55 days after the deadline in § 1.621(a)(2) or 35 days after the expiration of any stay period under § 1.624, whichever is later, NFS will refer the case for a hearing as follows:

(1) If the hearing is to be conducted by USDA, NFS will refer the case to the OALJ.

(2) If the hearing is to be conducted by another Department, NFS will refer the case to the hearings component used by that Department.

(b) *Content.* The case referral will consist of the following:

(1) Two copies of any preliminary condition under § 1.620;

(2) The original and one copy of any hearing request under § 1.621;

(3) The original and one copy of any notice of intervention and response under § 1.622;

(4) The original and one copy of any answer or notice in lieu of answer under § 1.625; and

(5) The original and one copy of a referral notice under paragraph (c) of this section.

(c) *Notice.* At the time NFS refers the case for a hearing, it must provide a referral notice that contains the following information:

(1) The name, address, telephone number, and facsimile number of the Department hearings component that will conduct the hearing;

(2) The name, address, and other contact information for the representative of each party to the hearing process;

(3) An identification of any other hearing request that will be consolidated with this hearing request; and

(4) The effective date of the case referral to the appropriate Department hearings component.

(d) *Delivery and service.* (1) NFS must refer the case to the appropriate Department hearings component by one of the methods identified in § 1.612(b)(1)(i) and (b)(1)(ii).

(2) The Forest Service must serve a copy of the referral notice on FERC and each party to the hearing by one of the methods identified in § 1.613(c)(1) and (c)(2).

§ 1.627 What regulations apply to a case referred for a hearing?

(a) If NFS refers the case to the OALJ, these regulations will continue to apply to the hearing process.

(b) If NFS refers the case to the Department of Interior's Office of Hearing and Appeals, the regulations at 43 CFR 45.1 *et seq.* will apply from that point on.

(c) If NFS refers the case to the Department of Commerce's designated ALJ office, the regulations at 50 CFR 221.1 *et seq.* will apply from that point on.

General Provisions Related to Hearings

§ 1.630 What will OALJ do with a case referral?

Within 5 days after the effective date stated in the referral notice under § 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4):

(a) The Hearing Clerk must:

(1) Docket the case;

(2) Either:

(i) Request FERC to assign a FERC ALJ ~~Assign an ALJ~~ to preside over the hearing process and issue a decision [Alternative 1]; ~~and~~or

(ii) Utilize a lottery system of all available ALJs in the geographic region of the project to select an ALJ at random [Alternative 2]; and

(3) Issue a docketing notice that informs the parties of the docket number and the ALJ assigned to the case; and

(b) The ALJ must issue a notice setting the time, place, and method for conducting an initial prehearing conference under § 1.640. This notice may be combined with the docketing notice under paragraph (a)(3) of this section.

§ 1.631 What are the powers of the ALJ?

The ALJ will have all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process relating to Forest Service's or other Department's condition or prescription that has been referred to the ALJ for hearing, including the powers to:

(a) Administer oaths and affirmations; (b) Issue subpoenas under § 1.647;

(c) Shorten or enlarge time periods set forth in these regulations, except that the deadline in § 1.660(a)(2) can be extended only if the ALJ must be replaced under § 1.632 or 1.633;

(d) Rule on motions;

(e) Authorize discovery as provided for in §§ 1.641 through 1.647;

(f) Hold hearings and conferences; (g) Regulate the course of hearings; (h) Call and question witnesses;

(i) Exclude any person from a hearing or conference for misconduct or other good cause;

(j) Summarily dispose of any hearing request or issue as to which the ALJ determines there is no disputed issue of material fact;

(k) Issue a decision consistent with § 1.660(b) regarding any disputed issue of material fact; and

(l) Take any other action authorized by law.

§ 1.632 What happens if the ALJ becomes unavailable?

(a) If the ALJ becomes unavailable or otherwise unable to perform the duties described in § 1.631, the Hearing Clerk will designate a successor.

(b) If a hearing has commenced and the ALJ cannot proceed with it, a successor ALJ may do so. At the request of a party, the successor ALJ may recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The

successor ALJ may, within his or her discretion, recall any other witness.

§ 1.633 Under what circumstances may the ALJ be disqualified?

(a) The ALJ may withdraw from a case at any time the ALJ deems himself or herself disqualified.

(b) At any time before issuance of the ALJ's decision, any party may move that the ALJ disqualify himself or herself for personal bias or other valid cause.

(1) The party must file the motion promptly after discovering facts or other reasons allegedly constituting cause for disqualification.

(2) The party must file with the motion an affidavit or declaration setting forth the facts or other reasons in detail.

(c) The ALJ must rule upon the motion, stating the grounds for the ruling.

(1) If the ALJ concludes that the motion is timely and meritorious, he or she must disqualify himself or herself and withdraw from the case.

(2) If the ALJ does not disqualify himself or herself and withdraw from the case, the ALJ must continue with the hearing process and issue a decision.

§ 1.634 What is the law governing ex parte communications?

(a) Ex parte communications with the ALJ or his or her staff are prohibited in accordance with 5 U.S.C. 554(d).

(b) This section does not prohibit ex parte inquiries concerning case status or procedural requirements, unless the inquiry involves an area of controversy in the hearing process.

§ 1.635 What are the requirements for motions?

(a) *General.* Any party may apply for an order or ruling on any matter related to the hearing process by presenting a motion to the ALJ. A motion may be presented any time after the Hearing Clerk issues a docketing notice under § 1.630.

(1) A motion made at a hearing may be stated orally on the record, unless the ALJ directs that it be reduced to writing. (2) Any other motion must:

(i) Be in writing;

(ii) Comply with the requirements of §§ 1.610 through 1.613 with respect to form, content, filing, and service; and

(iii) Not exceed 15 pages, including all supporting arguments.

(b) *Content.* (1) Each motion must state clearly and concisely:

(i) Its purpose and the relief sought;

(ii) The facts constituting the grounds for the relief sought; and

(iii) Any applicable statutory or regulatory authority.

(2) A proposed order must accompany the motion.

(c) *Response.* Except as otherwise required by this part, any other party may file a response to a written motion within 10 days after service of the motion. The response may not exceed 15 pages, including all supporting arguments. When a party presents a motion at a hearing, any other party may present a response orally on the record.

(d) *Reply.* Unless the ALJ orders otherwise, no reply to a response may be filed.

(e) *Effect of filing.* Unless the ALJ orders otherwise, the filing of a motion does not stay the hearing process.

(f) *Ruling.* The ALJ will rule on the motion as soon as practicable, either orally on the record or in writing. He or she may summarily deny any dilatory, repetitive, or frivolous motion.

Prehearing Conferences and Discovery

§ 1.640 What are the requirements for prehearing conferences?

(a) *Initial prehearing conference.* The ALJ will conduct an initial prehearing conference with the parties at the time specified in the notice under § 1.630, on or about the 20th day after the effective date stated in the referral notice under § 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4).

(1) The initial prehearing conference will be used:

(i) To identify, narrow, and clarify the disputed issues of material fact and exclude issues that do not qualify for review as factual, material, and disputed;

(ii) To consider the parties' motions for discovery under § 1.641 and to set a deadline for the completion of discovery;

(iii) To discuss the evidence on which each party intends to rely at the hearing; (iv) To set deadlines for submission of written testimony under § 1.652 and exchange of exhibits to be offered as evidence under § 1.654; and

(v) To set the date, time, and place of the hearing.

(2) The initial prehearing conference may also be used:

(i) To discuss limiting and grouping witnesses to avoid duplication;

(ii) To discuss stipulations of fact and of the content and authenticity of documents;

(iii) To consider requests that the ALJ take official notice of public records or other matters;

(iv) To discuss the submission of written testimony, briefs, or other documents in electronic form; and

(v) To consider any other matters that may aid in the disposition of the case.

(b) *Other conferences.* The ALJ may in his or her discretion direct the parties to attend one or more other prehearing conferences, if consistent with the need to complete the hearing process within 90 days. Any party may by motion request a conference.

(c) *Notice.* The ALJ must give the parties reasonable notice of the time and place of any conference. A conference will ordinarily be held by telephone, unless the ALJ orders otherwise.

(d) *Preparation.* (1) Each party's representative must be fully prepared to discuss all issues pertinent to that party that are properly before the conference, both procedural and substantive. The representative must be authorized to commit the party that he or she represents respecting those issues.

(2) Before the date set for the initial prehearing conference, the parties' representatives must make a good faith effort:

(i) To meet in person, by telephone, or by other appropriate means; and

(ii) To reach agreement on discovery and the schedule of remaining steps in the hearing process.

(e) *Failure to attend.* Unless the ALJ orders otherwise, a party that fails to attend or participate in a conference, after being served with reasonable notice of its time and place, waives all objections to any agreements reached in the conference and to any consequent orders or rulings.

(f) *Scope.* During a conference, the ALJ may dispose of any procedural matters related to the case.

(g) *Order.* Within 2 days after the conclusion of each conference, the ALJ must issue an order that recites any agreements reached at the conference and any rulings made by the ALJ during or as a result of the conference.

(h) The ALJ will balance the convenience to all parties in choosing a location for the hearing.

§ 1.641 How may parties obtain discovery of information needed for the case?

(a) *General.* By agreement of the parties or with the permission of the ALJ, a party may obtain discovery of information to assist the party in preparing or presenting its case. Available methods of discovery are:

(1) Written interrogatories as provided in § 1.643;

(2) Depositions of witnesses as provided in paragraph (h) of this section; and

(3) Requests for production of designated documents or tangible things or for entry on designated land for inspection or other purposes.

(b) *Criteria.* Discovery may occur only as agreed to by the parties or as authorized by the ALJ during a prehearing conference or in a written order under § 1.640(g). The ALJ may authorize

discovery only if the party requesting discovery demonstrates:

(1) That the discovery will not unreasonably delay the hearing process;

(2) That the information sought:

(i) Will be admissible at the hearing or appears reasonably calculated to lead to the discovery of admissible evidence;

(ii) Is not already in the license proceeding record or otherwise obtainable by the party;

(iii) Is not cumulative or repetitious; and

(iv) Is not privileged or protected from disclosure by applicable law;

(3) That the scope of the discovery is not unduly burdensome;

(4) That the method to be used is the least burdensome method available; (5) That any trade secrets or proprietary information can be adequately safeguarded; and

(6) That the standards for discovery under paragraphs (f) through (h) of this section have been met, if applicable.

(c) *Motions.* A party may initiate discovery:

(1) Pursuant to an agreement of the parties; or

(2) By filing a motion that:

(i) Briefly describes the proposed method(s), purpose, and scope of the discovery;

(ii) Explains how the discovery meets the criteria in paragraphs (b)(1) through (b)(6) of this section; and

(iii) Attaches a copy of any proposed discovery request (written interrogatories, notice of deposition, or request for production of designated documents or tangible things or for entry on designated land).

(d) *Timing of motions.* A party must file any discovery motion under paragraph (c)(2) of this section within 7 days after the effective date stated in the referral notice under § 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4). (e) *Objections.* (1) A party must file any objections to a discovery motion or to specific portions of a proposed discovery request within 7 days after service of the motion.

(2) An objection must explain how, in the objecting party's view, the discovery sought does not meet the criteria in paragraphs (b)(1) through (6) of this section.

(f) *Materials prepared for hearing.* A party generally may not obtain discovery of documents and tangible things otherwise discoverable under paragraph (b) of this section if they were prepared in anticipation of or for the hearing by or for another party's representative (including the party's attorney, expert, or consultant).

(1) If a party wants to discover such materials, it must show:

(i) That it has substantial need of the materials in preparing its own case; and (ii) That the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

(2) In ordering discovery of such materials when the required showing has been made, the ALJ must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.

(g) *Experts.* Unless restricted by the ALJ, a party may discover any facts known or opinions held by an expert through the methods set out in paragraph (a) of this section concerning any relevant matters that are not privileged. Such discovery will be permitted only if:

(1) The expert is expected to be a witness at the hearing; or

(2) The expert is relied on by another expert who is expected to be a witness at the hearing, and the party shows:

(i) That it has a compelling need for the information; and

(ii) That it cannot practicably obtain the information by other means.

(h) *Limitations on depositions.* (1) A party may depose an expert or non- expert witness only if the party shows that the witness:

(i) Will be unable to attend the hearing because of age, illness, or other incapacity; or

(ii) Is unwilling to attend the hearing voluntarily, and the party is unable to compel the witness's attendance at the hearing by subpoena.

(2) Paragraph (h)(1)(ii) of this section does not apply to any person employed by or under contract with the party seeking the deposition.

(3) A party may depose a senior Department employee only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the deposition would not significantly interfere with the employee's ability to perform his or her government duties.

(4) Unless otherwise stipulated to by the parties or authorized by the ALJ upon a showing of extraordinary circumstances, a deposition is limited to 1 day of 7 hours.

(i) *Completion of discovery.* All discovery must be completed within 25 days after the initial prehearing conference.

§ 1.642 When must a party supplement or amend information it has previously provided?

(a) *Discovery.* A party must promptly supplement or amend any prior response to a discovery request if it learns that the response:

(1) Was incomplete or incorrect when made; or

(2) Though complete and correct when made, is now incomplete or incorrect in any material respect.

(b) *Witnesses and exhibits.* (1) Within 10 days after the date set for completion of discovery, each party must file an updated version of the list of witnesses and exhibits required under § 1.621(c), § 1.622(c), or § 1.625(c).

(2) If a party wishes to include any new witness or exhibit on its updated list, it must provide an explanation of why it was not feasible for the party to include the witness or exhibit on its list under § 1.621(c), § 1.622(c), or § 1.625(c).

(c) *Failure to disclose.* (1) A party will not be permitted to introduce as evidence at the hearing testimony from a witness or other information that it failed to disclose under § 1.621(c), § 1.622(c), or § 1.625(c), or paragraph (a) or (b) of this section.

(2) Paragraph (c)(1) of this section does not apply if the failure to disclose was substantially justified or is harmless.

(3) A party may object to the admission of evidence under paragraph (c)(1) of this section before or during the hearing.

(4) The ALJ will consider the following in determining whether to exclude evidence under paragraphs (c)(1) through (3) of this section:

(i) The prejudice to the objecting party;

(ii) The ability of the objecting party to cure any prejudice;

(iii) The extent to which presentation of the evidence would disrupt the orderly and efficient hearing of the case;

(iv) The importance of the evidence; and

(v) The reason for the failure to disclose, including any bad faith or willfulness regarding the failure.

§ 1.643 What are the requirements for written interrogatories?

(a) *Motion; limitation.* Except upon agreement of the parties:

(1) A party wishing to propound interrogatories must file a motion under § 1.641(c); and

(2) A party may propound no more than 25 interrogatories, counting discrete subparts as separate interrogatories, unless the ALJ approves a higher number upon a showing of good cause.

(b) *ALJ order.* The ALJ will issue an order under § 1.641(b) with respect to any discovery motion requesting the use of written interrogatories. The order will:

(1) Grant the motion and approve the use of some or all of the proposed interrogatories; or

(2) Deny the motion.

(c) *Answers to interrogatories.* Except upon agreement of the parties, the party to whom the proposed interrogatories are directed must file its answers to any interrogatories approved by the ALJ within 15 days after issuance of the order under paragraph (b) of this section.

(1) Each approved interrogatory must be answered separately and fully in writing.

(2) The party or its representative must sign the answers to interrogatories under oath or affirmation.

(d) *Access to records.* A party's answer to an interrogatory is sufficient when:

(1) The information may be obtained from an examination of records, or from a compilation, abstract, or summary based on such records;

(2) The burden of obtaining the information from the records is substantially the same for all parties;

(3) The answering party specifically identifies the individual records from which the requesting party may obtain the information and where the records are located; and

(4) The answering party provides the requesting party with reasonable opportunity to examine the records and make a copy, compilation, abstract, or summary.

§ 1.644 What are the requirements for depositions?

(a) *Motion and notice.* Except upon agreement of the parties, a party wishing to take a deposition must file a motion under § 1.641(c). Any notice of deposition filed with the motion must state:

(1) The time and place that the deposition is to be taken;

(2) The name and address of the person before whom the deposition is to be taken;

(3) The name and address of the witness whose deposition is to be taken; and

(4) Any documents or materials that the witness is to produce.

(b) *ALJ order.* The ALJ will issue an order under § 1.641(b) with respect to any discovery motion requesting the taking of a deposition. The order will:

(1) Grant the motion and approve the taking of the deposition, subject to any conditions or restrictions the ALJ may impose; or

(2) Deny the motion.

(c) *Arrangements.* If the parties agree to or the ALJ approves the taking of the deposition, the party requesting the deposition must make appropriate arrangements for necessary facilities and personnel.

(1) The deposition will be taken at the time and place agreed to by the parties or indicated in the ALJ's order.

(2) The deposition may be taken before any disinterested person authorized to administer oaths in the place where the deposition is to be taken.

(3) Any party that objects to the taking of a deposition because of the disqualification of the person before whom it is to be taken must do so:

(i) Before the deposition begins; or

(ii) As soon as the disqualification becomes known or could have been discovered with reasonable diligence.

(4) A deposition may be taken by telephone conference call, if agreed to by the parties or approved in the ALJ's order.

(d) *Testimony.* Each witness deposed must be placed under oath or affirmation, and the other parties must be given an opportunity for cross- examination.

(e) *Representation of witness.* The witness being deposed may have counsel or another representative present during the deposition.

(f) *Recording and transcript.* Except as provided in paragraph (g) of this section, the deposition must be stenographically recorded and transcribed at the expense of the party that requested the deposition.

(1) Any other party may obtain a copy of the transcript at its own expense. (2) Unless waived by the deponent, the deponent will have 3 days after receiving the transcript to read and sign it.

(3) The person before whom the deposition was taken must certify the transcript following receipt of the signed transcript from the deponent or expiration of the 3-day review period, whichever occurs first.

(g) *Video recording.* The testimony at a deposition may be recorded on videotape, subject to any conditions or restrictions that the parties may agree to or the ALJ may impose, at the expense of the party requesting the recording. (1) The video recording may be in conjunction with an oral examination by telephone conference held under paragraph (c)(4) of this section.

(2) After the deposition has been taken, the person recording the deposition must:

(i) Provide a copy of the videotape to any party that requests it, at the requesting party's expense; and

(ii) Attach to the videotape a statement identifying the case and the deponent and certifying the authenticity of the video recording.

(h) *Use of deposition.* A deposition may be used at the hearing as provided in § 1.653.

§ 1.645 What are the requirements for requests for documents or tangible things or entry on land?

(a) *Motion.* Except upon agreement of the parties, a party wishing to request the production of designated documents or tangible things or entry on designated land must file a motion under § 1.641(c). A request may include any of the following that are in the possession, custody, or control of another party:

(1) The production of designated documents for inspection and copying, other than documents that are already in the license proceeding record;

(2) The production of designated tangible things for inspection, copying, testing, or sampling; or

(3) Entry on designated land or other property for inspection and measuring, surveying, photographing, testing, or sampling either the property or any designated object or operation on the property.

(b) *ALJ order.* The ALJ will issue an order under § 1.641(b) with respect to any discovery motion requesting the production of documents or tangible things or entry on land for inspection, copying, or other purposes. The order will:

(1) Grant the motion and approve the use of some or all of the proposed requests; or

(2) Deny the motion.

(c) *Compliance with order.* Except upon agreement of the parties, the party to whom any approved request for production is directed must permit the approved inspection and other activities within 15 days after issuance of the order under paragraph (a) of this section.

§ 1.646 What sanctions may the ALJ impose for failure to comply with discovery?

(a) Upon motion of a party, the ALJ may impose sanctions under paragraph (b) of this section if any party:

(1) Fails to comply with an order approving discovery; or

(2) Fails to supplement or amend a response to discovery under § 1.642(a).

(b) The ALJ may impose one or more of the following sanctions:

(1) Infer that the information, testimony, document, or other evidence withheld would have been adverse to the party;

(2) Order that, for the purposes of the hearing, designated facts are established;

(3) Order that the party not introduce into evidence, or otherwise rely on to

support its case, any information, testimony, document, or other evidence:

(i) That the party improperly withheld; or

(ii) That the party obtained from another party in discovery;

(4) Allow another party to use secondary evidence to show what the information, testimony, document, or other evidence withheld would have shown; or

(5) Take other appropriate action to remedy the party's failure to comply.

§ 1.64 What are the requirements for subpoenas and witness fees?

(a) *Request for subpoena.* (1) Except as provided in paragraph (a)(2) of this section, any party may request by written motion that the ALJ issue a subpoena to the extent authorized by law for the attendance of a person, the giving of testimony, or the production of documents or other relevant evidence during discovery or for the hearing.

(2) A party may request a subpoena for a senior Department employee only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the employee's attendance would not significantly interfere with the ability to perform his or her government duties.

(b) *Service.* (1) A subpoena may be served by any person who is not a party and is 18 years of age or older.

(2) Service must be made by hand delivering a copy of the subpoena to the person named therein.

(3) The person serving the subpoena must:

(i) Prepare a certificate of service setting forth:

(A) The date, time, and manner of service; or

(B) The reason for any failure of service; and

(ii) Swear to or affirm the certificate, attach it to a copy of the subpoena, and return it to the party on whose behalf the subpoena was served.

(c) *Witness fees.* (1) A party who subpoenas a witness who is not a party must pay him or her the same fees and mileage expenses that are paid witnesses in the district courts of the United States.

(2) A witness who is not a party and who attends a deposition or hearing at the request of any party without having been subpoenaed is entitled to the same fees and mileage expenses as if he or she had been subpoenaed. However, this paragraph does not apply to Federal employees who are called as witnesses by the Forest Service or another Department.

(d) *Motion to quash.* (1) A person to whom a subpoena is directed may request by motion that the ALJ quash or modify the subpoena.

(2) The motion must be filed:

(i) Within 5 days after service of the subpoena; or

(ii) At or before the time specified in the subpoena for compliance, if that is less than 5 days after service of the subpoena.

(3) The ALJ may quash or modify the subpoena if it:

(i) Is unreasonable;

(ii) Requires production of information during discovery that is not discoverable; or

(iii) Requires disclosure of irrelevant, privileged, or otherwise protected information.

(e) *Enforcement.* For good cause shown, the ALJ may apply to the appropriate United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence as set forth in a subpoena that has been duly issued and served.

Hearing, Briefing, and Decision

§ 1.650 When and where will the hearing be held?

(a) Except as provided in paragraph (b) of this section, the hearing will be held at the time and place set at the initial prehearing conference under § 1.640, generally within 25 days after the date set for completion of discovery.

(b) On motion by a party or on the ALJ's initiative, the ALJ may change the date, time, or place of the hearing if he or she finds:

(1) That there is good cause for the change; and

(2) That the change will not unduly prejudice the parties and witnesses.

§ 1.651 What are the parties' rights during the hearing?

Each party has the following rights during the hearing, as necessary to assure full and accurate disclosure of the facts:

(a) To present testimony and exhibits, consistent with the requirements in §§ 1.621(c), 1.622(c), 1.625(c), 1.642(b), and 1.652;

(b) To make objections, motions, and arguments; and

(c) To cross-examine witnesses and to conduct re-direct and re-cross examination as permitted by the ALJ.

§ 1.652 What are the requirements for presenting testimony?

(a) *Written direct testimony.* Unless otherwise ordered by the ALJ, all direct hearing testimony for each party's initial case must be prepared and submitted in written form. The ALJ will determine whether rebuttal testimony, if allowed, must be submitted in written form.

(1) Prepared written testimony must:

(i) Have line numbers inserted in the left-hand margin of each page;

(ii) Be authenticated by an affidavit or declaration of the witness;

(iii) Be filed within 10 days after the date set for completion of discovery; and

(iv) Be offered as an exhibit during the hearing.

(2) Any witness submitting written testimony must be available for cross-examination at the hearing.

(b) *Oral testimony.* Oral examination of a witness in a hearing, including on cross-examination or redirect, must be conducted under oath and in the presence of the ALJ, with an opportunity for all parties to question the witness.

(c) *Telephonic testimony.* The ALJ may by order allow a witness to testify by telephonic conference call.

(1) The arrangements for the call must let each party listen to and speak to the witness and each other within the hearing of the ALJ.

(2) The ALJ will ensure the full identification of each speaker so the reporter can create a proper record.

(3) The ALJ may issue a subpoena under § 1.647 directing a witness to testify by telephonic conference call.

§ 1.653 How may a party use a deposition in the hearing?

(a) *In general.* Subject to the provisions of this section, a party may use in the hearing any part or all of a deposition taken under § 1.644 against any party who:

(1) Was present or represented at the taking of the deposition; or

(2) Had reasonable notice of the taking of the deposition.

(b) *Admissibility.* (1) No part of a deposition will be included in the hearing record, unless received in evidence by the ALJ.

(2) The ALJ will exclude from evidence any question and response to which an objection:

(i) Was noted at the taking of the deposition; and

(ii) Would have been sustained if the witness had been personally present and testifying at a hearing.

(3) If a party offers only part of a deposition in evidence:

(i) An adverse party may require the party to introduce any other part that ought in fairness to be considered with the part introduced; and

(ii) Any other party may introduce any other parts.

(c) *Videotaped deposition.* If the deposition was recorded on videotape and is admitted into evidence, relevant portions will be played during the hearing and transcribed into the record by the reporter.

§ 1.654 What are the requirements for exhibits, official notice, and stipulations?

(a) *General.* (1) Except as provided in paragraphs (b) through (d) of this section, any material offered in evidence, other than oral testimony, must be offered in the form of an exhibit.

(2) Each exhibit offered by a party must be marked for identification.

(3) Any party who seeks to have an exhibit admitted into evidence must provide:

(i) The original of the exhibit to the reporter, unless the ALJ permits the substitution of a copy; and

(ii) A copy of the exhibit to the ALJ.

(b) *Material not offered.* If a document offered as an exhibit contains material not offered as evidence:

(1) The party offering the exhibit must:

(i) Designate the matter offered as evidence;

(ii) Segregate and exclude the material not offered in evidence, to the extent practicable; and

(iii) Provide copies of the entire document to the other parties appearing at the hearing.

(2) The ALJ must give the other parties an opportunity to inspect the entire document and offer in evidence any other portions of the document.

(c) *Official notice.* (1) At the request of any party at the hearing, the ALJ may take official notice of any matter of which the courts of the United States may take judicial notice, including the public records of any Department party.

(2) The ALJ must give the other parties appearing at the hearing an opportunity to show the contrary of an officially noticed fact.

(3) Any party requesting official notice of a fact after the conclusion of the hearing must show good cause for its failure to request official notice during the hearing.

(d) *Stipulations.* (1) The parties may stipulate to any relevant facts or to the authenticity of any relevant documents.

(2) If received in evidence at the hearing, a stipulation is binding on the stipulating parties.

(3) A stipulation may be written or made orally at the hearing.

§ 1.655 What evidence is admissible at the hearing?

(a) *General.* (1) Subject to the provisions of § 1.642(b), the ALJ may admit any written, oral, documentary, or demonstrative evidence that is:

(i) Relevant, reliable, and probative; and

(ii) Not privileged or unduly repetitious or cumulative.

(2) The ALJ may exclude evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues, or delay.

(3) Hearsay evidence is admissible. The ALJ may consider the fact that evidence is hearsay when determining its probative value.

(4) The Federal Rules of Evidence do not directly apply to the hearing, but may be used as guidance by the ALJ and the parties in interpreting and applying the provisions of this section.

(b) *Objections.* Any party objecting to the admission or exclusion of evidence must concisely state the grounds. A ruling on every objection must appear in the record.

§ 1.656 What are the requirements for transcription of the hearing?

(a) *Transcript and reporter's fees.* The hearing will be transcribed verbatim.

(1) The Forest Service will secure the services of a reporter and pay the reporter's fees to provide an original transcript to the OALJ on an expedited basis.

(2) Each party must pay the reporter for any copies of the transcript obtained by that party.

(b) *Transcript corrections.* (1) Any party may file a motion proposing corrections to the transcript. The motion must be filed within 5 days after receipt of the transcript, unless the ALJ sets a different deadline.

(2) Unless a party files a timely motion under paragraph (b)(1) of this section, the transcript will be presumed to be correct and complete, except for obvious typographical errors.

(3) As soon as practicable after the close of the hearing and after consideration of any motions filed under paragraph (b)(1) of this section, the ALJ will issue an order making any corrections to the transcript that the ALJ finds are warranted.

§ 1.657 Who has the burden of persuasion, and what standard of proof applies?

(a) ~~Any party who has filed a request for a hearing~~The Forest Service has the burden of persuasion to support any disputed ~~with respect to the~~ issues of material fact supporting its proposed conditions ~~raised by that party~~.

(b) The standard of proof is a preponderance of the evidence.

§ 1.658 When will the hearing record close?

(a) The hearing record will close when the ALJ closes the hearing, unless he or she directs otherwise.

(b) Evidence may not be added after the hearing record is closed, but the transcript may be corrected under § 1.656(b).

§ 1.659 What are the requirements for post-hearing briefs?

(a) *General.* (1) Each party may file a post-hearing brief within 15 days after the close of the hearing.

(2) A party may file a reply brief only if requested by the ALJ. The deadline for filing a reply brief, if any, will be set by the ALJ.

(3) The ALJ may limit the length of the briefs to be filed under this section. (b) *Content.* (1) An initial brief must include:

(i) A concise statement of the case;

(ii) A separate section containing proposed findings regarding the issues of material fact, with supporting citations to the hearing record;

(iii) Arguments in support of the party's position; and

(iv) Any other matter required by the ALJ.

(2) A reply brief, if requested by the ALJ, must be limited to any issues identified by the ALJ.

(c) *Form.* (1) An exhibit admitted in evidence or marked for identification in the record may not be reproduced in the brief.

(i) Such an exhibit may be reproduced, within reasonable limits, in an appendix to the brief.

(ii) Any pertinent analysis of an exhibit may be included in a brief.

(2) If a brief exceeds 20 pages, it must contain:

(i) A table of contents and of points made, with page references; and

(ii) An alphabetical list of citations to legal authority, with page references.

§ 1.660 What are the requirements for the ALJ's decision?

(a) *Timing.* The ALJ must issue a decision within the shorter of the following time periods:

(1) 30 days after the close of the hearing under § 1.658; or

(2) 120 days after the effective date stated in the referral notice under § 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4).

(b) *Content.* (1) The decision must contain:

(i) Findings of fact on all disputed issues of material fact;

(ii) Conclusions of law necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence); and

(iii) Reasons for the findings and conclusions.

(2) The ALJ may adopt any of the findings of fact proposed by one or more of the parties.

(3) The decision will not contain conclusions as to whether any preliminary condition or prescription should be adopted, modified, or rejected, or whether any proposed alternative should be accepted or rejected.

(c) *Service.* Promptly after issuing his or her decision, the ALJ must:

(1) Serve the decision on each party to the hearing;

(2) Prepare a list of all documents that constitute the complete record for the hearing process (including the decision) and certify that the list is complete; and

(3) Forward to FERC the complete record for the hearing process, along with the certified list prepared under paragraph (c)(2) of this section, for inclusion in the record for the license proceeding. Materials received in electronic form, *e.g.*, as attachments to electronic mail, should be transmitted to FERC in electronic form. However, for cases in which a settlement was reached prior to a decision, the entire record need not be transmitted to FERC. In such situations, only the initial pleadings (hearing requests with attachments, any notices of intervention and response, answers, and referral notice) and any dismissal order of the ALJ need be transmitted.

(d) *Finality.* The ALJ's decision under this section with respect to the disputed issues of material fact will not be subject to further administrative review. To the extent the ALJ's decision forms the basis for any condition or prescription subsequently included in the license, it may be subject to judicial review under 16 U.S.C. 825*l*(b).

Alternatives Process

§ 1.670 How must documents be filed and served under this subpart?

(a) *Filing.* (1) A document under this subpart must be filed using one of the methods set forth in § 1.612(b).

(2) A document is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(b) *Service.* (1) Any document filed under this subpart must be served at the same time the document is delivered or sent for filing. A complete copy of the document must be delivered or sent to each license party and FERC, using:

(i) One of the methods of service in § 1.613(c); or

(ii) Regular mail.

(2) The provisions of § 1.613(d) regarding a certificate of service apply to service under this subpart.

(2) File a written proposal with NFS, at the appropriate address provided in § 1.612(a)(1):

(i) For a case under § 1.601(d)(1), within ~~30~~45 days after the Forest Service files its preliminary conditions with FERC; or

(ii) For a case under § 1.601(d)(2), within 60 days after the Forest Service files its proposed conditions with FERC.

(b) *Content.* Your proposal must include:

(1) A description of the alternative, in an equivalent level of detail to the Forest Service's preliminary condition; (2) An explanation of how the alternative will provide for the adequate protection and utilization of the reservation;

(3) An explanation of how the alternative, as compared to the preliminary condition, will:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production;

(4) An explanation of how the alternative will affect:

(i) Energy supply, distribution, cost, and use;

(ii) Flood control;

(iii) Navigation;

(iv) Water supply;

(v) Air quality; and

(vi) Other aspects of environmental quality; and

(5) Specific citations to any scientific studies, literature, and other documented information relied on to support your proposal, including any assumptions you are making (*e.g.*, regarding the cost of energy or the rate of inflation). If any such document is not already in the license proceeding record, you must provide a copy with the proposal.

§ 1.672 May I file a revised proposed alternative?

(a) Within ~~20~~60 days after issuance of the ALJ's decision under § 1.660, you may file with NFS, at the appropriate address provided in § 1.612(a)(1), a revised proposed alternative condition if:

(1) You previously filed a proposed alternative that met the requirements of § 1.671; and

(2) Your revised proposed alternative is designed to respond to one or more findings of fact by the ALJ.

(b) Your revised proposed alternative must:

(1) Satisfy the content requirements for a proposed alternative under § 1.671(b); and

(2) Identify the specific ALJ finding(s) to which the revised proposed alternative is designed to respond and how the revised proposed alternative differs from the original alternative.

(c) Filing a revised proposed alternative will constitute a withdrawal of the previously filed proposed alternative.

§ 1.673 When will the Forest Service file its modified condition?

(a) Except as provided in paragraph (b) of this section, if any license party proposes an alternative to a preliminary condition or prescription under § 1.671, the Forest Service will do the following within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c):

(1) Analyze under § 1.674 any alternative condition proposed under § 1.671 or 1.672; and

(2) File with FERC:

(i) Any condition the Forest Service adopts as its modified condition; and

(ii) The Forest Service's analysis of the modified condition and any proposed alternative.

(b) If the Forest Service needs additional time to complete the steps set forth in paragraphs (a)(1) and (2) of this section, it will so inform FERC within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c).

§ 1.674 How will the Forest Service analyze a proposed alternative and formulate its modified condition?

(a) In deciding whether to accept an alternative proposed under § 1.671 or § 1.672, the Forest Service must consider evidence and supporting material provided by any license party or otherwise reasonably available to the Forest Service, including:

(1) Any evidence on the implementation costs or operational impacts for electricity production of the proposed alternative;

(2) Any comments received on the Forest Service's preliminary condition; (3) Any ALJ decision on disputed issues of material fact issued under § 1.660 with respect to the preliminary condition;

(4) Comments received on any draft or final NEPA documents; and

(5) The license party's proposal under § 1.671 or § 1.672.

(b) The Forest Service must accept a proposed alternative or revised alternative if the Forest

Service determines, based on substantial evidence provided by any license party or otherwise available to the Forest Service, that the alternative:

(1) Will, as compared to the Forest Service's preliminary condition: (i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production; and

(2) Will provide for the adequate protection and utilization of the reservation.

(c) For purposes of paragraphs (a) and (b) of this section, the Forest Service will consider evidence and supporting material provided by any license party by the deadline for filing comments on FERC's NEPA document under 18 CFR 5.25(c).

(d) When the Forest Service files with FERC the condition that the Forest Service adopts as its modified condition under § 1.673(a)(2), it must also file:

(1) A written statement explaining:

(i) The basis for the adopted condition;

(ii) If the Forest Service is not accepting any pending alternative, its reasons for not doing so; and

(iii) If any alternative submitted under § 1.671 was subsequently withdrawn by the license party, that the alternative was withdrawn; and

(2) Any study, data, and other factual information relied on that is not already part of the licensing proceeding record.

(e) The written statement under paragraph (d)(1) of this section must demonstrate that the Forest Service gave equal consideration to the effects of the condition adopted and any alternative not accepted on:

(1) Energy supply, distribution, cost, and use;

(2) Flood control;

(3) Navigation;

(4) Water supply;

(5) Air quality; and

(6) Preservation of other aspects of environmental quality.

§ 1.675 Has OMB approved the information collection provisions of this subpart?

Yes. This subpart contains provisions in §§ 1.670 through 1.674 that would collect information from the public. It therefore requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA). According to the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number that indicates OMB approval. OMB has reviewed the information collection in this rule and approved it under OMB control number 1094–0001.